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No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

ANTHONY DiLAPI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Do the following orders by a district court violate a defendant's Sixth Amendment right to the effective assistance of counsel:

(a) An order to a defendant, in violation of *Geders v. United States*, 425 U.S. 80 (1976), not to speak with his attorney during a trial recess;

(b) An order to defense counsel prior to trial not to discuss certain material evidence with defendants;

(c) An order to defense counsel prior to trial not to speak with or otherwise contact certain material witnesses except by a letter informing them that they need not cooperate, and that they must telephone defense counsel if they did want to cooperate.

2. Where in a criminal case, after the jury has been selected but not sworn, the Government disobeys a direct court order and refuses to produce material evidence:

(a) May the trial court, consistent with *Jencks v. United States*, 353 U.S. 657 (1957), seek to compel production of that evidence by use of its contempt power?

(b) If so, and if the Government then refuses to produce the evidence after it is adjudged to be in contempt of court, may the trial court then discharge the jury, stay all proceedings pending the Government's appeal of the contempt citation, and then over a year later empanel a second jury and subject the defendant to a new trial without violating the double jeopardy clause of the Fifth Amendment?

(c) May the one-year delay resulting from the Government's appeal of its contempt citation be charged against a defendant in determining whether his right to a speedy trial has been violated?

3. Is the Second Circuit Court of Appeals' decision in *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), *aff'd after remand*, 603 F.2d 1053 (1979), holding that a defendant's sentence may be determined based upon hearsay testimony about unidentified informants, unconstitutional on its face or as applied to the petitioner in this case?

Parties to the Proceeding Below

The original defendants at the trial of this case were petitioner DiLapi, Benjamin Ladmer (who in a separate petition is also seeking a writ of certiorari), David Bergner, Steven Kingston, Robert Rao, Sidney Lieberman and Interstate Dress Carriers, Inc.

The charges against Mr. Lieberman were severed during trial.

Messrs. Bergner, Kingston and Rao, as well as Interstate Dress Carriers, Inc., were acquitted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming Mr. DiLapi's conviction is reported at 651 F.2d 140 (2d Cir. 1981) and is reproduced in Appendix A hereto. The order denying rehearing is reproduced in Appendix B. Three other pertinent decisions of the Court of Appeals in this case, *In re Irving*, 600 F.2d 1027 (2d Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States v. DiLapi*, 616 F.2d 613 (2d Cir. 1979); and an unreported decision dated November 9, 1979, are reproduced in Appendices C, D and E.

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was filed on June 9, 1981. Mr. DiLapi duly moved for reargument, and that motion was denied on August 19, 1981. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, is reproduced in pertinent part in Appendix F hereto.

Statement of the Case

Introduction

This case raises several constitutional questions about the proper conduct of a criminal trial. A Government official's contempt of court by refusing to produce material evidence at trial deprived a defendant of evidence; deprived him of the jury he selected; and obliged him to wait over a year to be tried by a second jury. The trial court's erroneous instructions to a defendant not to consult with his counsel and to his counsel not to consult with witnesses, deprived defendant of the assistance of counsel. The trial court's sentencing decision rested on the improper admission of unreliable hearsay testimony regarding anonymous informants.

These erroneous actions of the prosecutor and the trial court raise urgent questions of the right to counsel, the right not to be put twice in jeopardy, the right to a speedy trial, and the right to a reliable sentencing determination. On several of these issues, the holding of the Second Circuit affirming the trial court is in conflict with decisions of other Courts of Appeals and with decisions of this Court.

Statement of Facts

In 1978, Matthew Eason, a convicted weapons offender and drug abuser, filed a representation petition with the National Labor Relations Board for certification of his union as the collective bargaining agent of employees of three companies. The indictment charged that Eason did so by filing authorization cards, supposedly executed by the requisite number of employees showing an interest in having Eason's union represent them. Shortly thereafter, Mr. DiLapi, an organizer in a rival labor union, called Eason and arranged a meeting.

The charge against DiLapi, and the core of his trial, concerned what happened at that meeting and in the few, brief conversations between Eason and Mr. DiLapi thereafter.

According to Eason, Mr. DiLapi and the other defendants threatened and attempted to bribe him to withdraw his petition.

Mr. DiLapi spoke with Eason on three occasions. In those conversations, Mr. DiLapi at Eason's request offered to compensate Eason's union for the out-of-pocket expenses of its organizing efforts in exchange for withdrawing in favor of Mr. DiLapi's union – a perfectly proper and commonplace procedure under NLRB rules. Mr. DiLapi vigorously denied that he ever threatened or attempted to bribe Eason. Even though Eason persistently asked Mr. DiLapi for more money, Mr. DiLapi's only offer was $1,000 – an offer made in response to Eason's request for reimbursement of his union's expenses.

Two of the conversations were recorded by Eason without Mr. DiLapi's knowledge. Neither of the recordings contains the slightest hint of a threat. To the contrary, during the first meeting, Mr. DiLapi told Eason, "I don't want to press you into doing anything." At the second meeting, when Eason said co-defendant David Bergner (who was later acquitted) had threatened him before, Mr. DiLapi specifically disavowed any knowledge of, or any participation in, any such threat. Significantly, Eason produced no tape of the earlier meeting, the only one at which he claimed that Mr. DiLapi even impliedly threatened him.

Eason's credibility was thus a central issue at the trial. The question for the jury was whether Eason, a convicted criminal, was a rival of Mr. DiLapi's who had concocted a story in order to aid his union's organizing drive, or whether he was, as the Government sought to portray him, something of a Boy Scout who somehow found himself in a den of thieves.

The jury had a difficult time deciding. It deliberated for four days, twice reporting it was deadlocked. After receiving supplemental instructions (which the Court of Appeals held were erroneous) and after being given an *Allen* charge, the jury convicted Mr. DiLapi and Mr. Ladmer on two counts -- obstruction of an administrative proceeding before the National Labor Relations Board and conspiracy to do the same, in violation of 18 U.S.C. §§ 371 and 1505.

Defendant Interstate Dress Carriers, Inc. ("IDC"), which employed the workers in question and for whose benefit the alleged conspiracy was formed, was acquitted. So was defendant Bergner, the only defendant who Eason claimed made an overt threat. So were defendants Steven Kingston, the president of DiLapi's union, and Robert Rao, the president of defendant Ladmer's union.

Pre-Trial Proceedings

Mr. DiLapi was arrested in May, 1978 and indicted on September 6, 1978. He was not tried until April, 1980 -- almost two years after his arrest.

One full year of this delay was caused by the Government's contemptuous refusal to produce material evidence to the defendants and the court.

In their very first pre-trial motions, Mr. DiLapi and his co-defendants sought to obtain the authorization cards and other documents that Eason had presented to the NLRB. Defendants' offer to prove that the cards were forged or the consents were coerced was fortified by their knowledge not only of Eason's criminal record, but of proof that Eason's prime lieutenant, the man primarily responsible for obtaining the cards, was a convicted forger. A showing of forgery or coercion would undermine Eason's credibility and prove that Eason

was an unscrupulous rival who would break the law and submit false evidence in order to obtain an advantage over Mr. DiLapi's union.[1]

The Government met the defense motions with a three-month-long series of evasions and delays. Finally, on what was scheduled to be the first day of trial, January 3, 1979, the prosecution moved to quash defendants' subpoenas and requests for the evidence on the ground that the authorization cards were absolutely privileged. The court reserved decision.

On January 4, jury selection began. By the following day, the jury had been selected and was sitting, but had not been sworn.

On January 8, 1979, the district court denied the Government's motion to quash, finding that the evidence in question lay "at the heart of the instant indictment" and that it was "material to adequate preparation of [the] defense." The district court ordered the Government to produce the evidence immediately.

Instead, the Government attempted to appeal the disclosure order. The following morning, January 9, the Court of Appeals for the Second Circuit dismissed the appeal, writing:"[The trial judge] did not abuse his discretion in finding that the materials sought here may be important in the preparation of the defense." *United States v. DiLapi*, 529 F.2d 1209 (2d Cir. 1979).

The Government then announced its refusal to comply with the district court's order.

Defendants thereupon asked the district court to dismiss the indictment, on the authority, *inter alia*, of *Jencks v. United States*, 353 U.S. 657 (1957), discussed *infra*, Point II. Instead, at the prosecutor's request,

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[1]Of the only two employees with whom defense counsel were ever able to speak, one said his signature on the card was forged, and the other said he had been coerced into signing.

the district court held the NLRB's General Counsel (who then had custody of the cards) in civil and criminal contempt of court, discharged the jury, and stayed all proceedings pending the outcome of the Government's appeal of the contempt citation. The court specifically held that the Government's misconduct was a "continuing impediment" to the trial.

Three months later, the Court of Appeals affirmed the adjudication of civil contempt. *In re Irving*, 600 F.2d 1027 (2d Cir.), *cert. denied*, 444 U.S. 866 (1979). It agreed that the evidence was material to the defense and should be produced. Nevertheless (over the objection of Judge Mansfield), it imposed two severe limitations on defendants' use of that evidence, based on its concern that defendants might seek to influence the witnesses: (1) it barred defense counsel from discussing the evidence with defendants; and (2) it barred counsel from speaking to any of the employees except in the presence of the court or a magistrate. *In re Irving*, 600 F.2d at 1036-37. (App. C).

On remand, although the prosecution at last produced the documents, the district court imposed unprecedented further limitations on defendants' ability to use them. The district court ruled that defense counsel could not even communicate with the employees who had signed the cards except by sending them written notification of their right to remain silent and hoping they would nevertheless take the initiative and contact defense counsel.

Defendants objected to this order and formally moved for its rescission, to no avail. Predictable, no employees appeared or otherwise responded to the letters.

Defendants then protested this interference with their right to counsel to the Court of Appeals, which agreed with them. On November 9, 1979, the Court of Appeals issued a writ of mandamus directing the trial

court to permit defense counsel to interview the witnesses wherever they could be found. (App. E).[2]

On remand, however, the district court was immovable. It *again* ordered defense counsel not to communicate with the employees except by sending them the same chilling written warning. Defense counsel once again made the vain effort to contact witnesses by means of the self-defeating letters required by the district court's order. They wrote such letters to 160 employees. Only two appeared for interviews.[3]

In this manner, the Government's contemptuous conduct was, in the district court's words, "a continuing impediment" to Mr. DiLapi's trial for almost a year – from January 1979 (when the jury was discharged because of the Government's contempt) until November (when the issue of the production of evidence was finally resolved in this most unsatisfactory manner). If not for the Government's contempt, Mr. DiLapi would have had the evidence on January 8, 1979, would have gone to trial that same day, and would have been able to go about interviewing the employees as he would have interviewed any other potential witnesses.

Thus, after almost a year of litigation – in which both the district court and the Court of Appeals held that the evidence was material to Mr. DiLapi's defense – Mr. DiLapi was denied the effective use of it. He was barred from discussing the evidence with his lawyer, and his lawyer was effectively barred from communicating with the witnesses.

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[2]The Court of Appeals left standing, however, the district court's requirement that defense counsel not reveal the names of the employees to their clients, and *added* the requirement that counsel not even discuss the *substance* of any interviews with their clients.

[3]Although both of these employees stated that Eason obtained their authorization cards by fraudulent means (see fn. 1, p. 6, *supra*) such testimony by only two employees could hardly provide a significant sample on which Mr. DiLapi could base a defense.

The Trial

The trial finally began on April 22, 1980 – over defendants' objections that the case should be dismissed on the ground of former jeopardy.[4]

At trial, the judge continued to interfere with Mr. DiLapi's right to the assistance of counsel. Just before a recess in Mr. DiLapi's testimony, the prosecutor asked that Mr. DiLapi "be instructed on cross-examination not to speak with his attorney." Mr. DiLapi's counsel objected promptly, stating the law correctly: "The witness is a defendant, Judge. He's got a right to confer with counsel at any time."

The district court responded by saying:

> "No, sir. You asked for it earlier and I gave it to you in the same case, and I give him the same instruction. He may not discuss the case until he comes back to the stand. Fair is fair."[5]

At the prosecutor's urging, the district court thus refused to distinguish between a defendant, who is entitled to the effective assistance of counsel, and an ordinary witness, who is not.

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[4]In November, 1979, when the Government made clear it would press for a trial before a new jury, Mr. DiLapi moved to dismiss the indictment on that ground. The district court denied the motion, and the Court of Appeals, on an interlocutory appeal, affirmed, holding that jeopardy had not attached in January 1979, because the jury that had sat for five days had not been formally sworn. *United States v. DiLapi*, 616 F.2d 613 (2d Cir. 1979). (App. D).

[5]The court's statement, "You asked for it earlier," referred to a request while Eason was on the stand:

> "[Mr. DiLapi's counsel]: I assume the usual rule prevails, the witness while under examination should speak to no one? Is that your Honor's policy?"
>
> "THE COURT: Mr. Eason, until you return to the stand, you are not to discuss your case with anyone – with anyone. That includes Mr. Harmon [the prosecutor] or anyone, any attorney, not to discuss it at all."

Mr. DiLapi resumed the stand after the recess, and he continued to testify throughout the day. Court recessed for the evening with Mr. DiLapi still on the stand. He resumed the stand the following morning, and concluded his testimony that second day.

The Sentence

When the jury's deadlock was broken after four days of deliberation by the *Allen* charge and other, erroneous, instructions, Mr. DiLapi was convicted on two counts – of obstructing an administrative proceeding and of conspiracy to do the same, in violation of 18 U.S.C. §§ 371 and 1505.

Mr. DiLapi was then sentenced to the exceptionally harsh term of two consecutive maximum sentences – five years for the substantive offense and five more for conspiracy to commit that offense.

The district court pronounced this sentence after admitting hearsay testimony of government agents that unidentified informants had told them that Mr. DiLapi "was a member of [a] crime family." It did so pursuant to standards adopted by the Second Circuit in *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), *aff'd after remand*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) – standards that are not used by other United States Courts of Appeals and which we challenge here as unconstitutional.

The Opinion Below

The Court of Appeals recognized that Mr. DiLapi's trial was infected with multiple and serious errors. 651 F.2d 140. (App. A). It agreed with Mr. DiLapi that the trial court's instruction that he not consult with his lawyer was erroneous, and would constitute reversible error under the law in all the circuits that had considered the issue. It ruled the instruction "should not again be

given" (App. A, p. 16a). It also found that other instructions to the jury (which we do not ask this Court to review[6]) were erroneous in several respects.

Although admitting that it was troubled by these errors, the panel nevertheless affirmed Mr. DiLapi's conviction, stating without citation of authority that the interference with his right to counsel was not prejudicial.

The Court of Appeals did not address Mr. DiLapi's arguments concerning (a) the trial court's pre-trial orders barring communications between Mr. DiLapi and his counsel, and between his counsel and potential witnesses; (b) his right to a speedy trial; and (c) the constitutionality of the *Fatico* sentencing standards.

Earlier, the Second Circuit had ruled that jeopardy did not attach when the first jury was discharged because of the Government's contempt. 616 F.2d 613 (2d Cir. 1979). (App. D).

Reasons for Granting the Writ

I

The District Court's Orders Restraining Communication Between a Defendant and His Attorney and Between His Attorney and Material Witnesses Were Reversible Error. The Decision Below Conflicts With the Holdings of Four Other Courts of Appeals Applying This Court's Decision in *Geders v. United States*.

A. The Instruction to Mr. DiLapi Not to Speak with His Attorney

At the prosecutor's request, the district court instructed Mr. DiLapi not to speak with his attorney

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[6]Those instructions are addressed in the petition of Benjamin Ladmer, which is submitted herewith. The arguments therein are equally applicable to Mr. DiLapi, who adopts and joins in them as if they were a part of this petition.

during a recess in the trial. That instruction violated Mr. DiLapi's Sixth Amendment right to the assistance of counsel.

In *Geders v. United States*, 425 U.S. 80 (1976), this Court unanimously[7] held that an order forbidding a defendant to consult with his counsel during an overnight recess denied him the assistance of counsel and required reversal of his conviction.

The parties disagree over whether the district court's instruction applied during the overnight recess as well as during the afternoon recess. If it did apply overnight, then *Geders* applies directly and the conviction must be reversed.[8]

Geders left open whether reversal would be required if a defendant were barred from communicating with his counsel during a routine trial recess. Two Justices, concurring, noted that the Court's reasoning required reversal whenever such an instruction was given – regardless of the length of the recess. 425 U.S. at 92. (Brennan and Marshall, JJ.)

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[7]Justice Stevens taking no part.

[8]The record seems clear that the instruction remained in effect throughout all recesses in Mr. DiLapi's testimony, because, by its terms, it applied throughout his examination, and it was never revoked. Moreover, the district court's prior instruction – to the ordinary witness, Eason – applied to all recesses during Eason's testimony, and the district court told Mr. DiLapi that he was under "the same instruction."

The Court of Appeals made its own factual finding that the trial court's order applied only to a brief recess. It made this finding even though there was never any hearing on that question in any court. We submitted below that any finding that *Geders* would be inapplicable to brief trial recesses would be premature without a hearing as to whether the instruction here was reasonably understood – by Mr. DiLapi and his counsel – to apply overnight as well.

Since *Geders*, the United States Courts of Appeals for the Fourth, Fifth, Sixth and Eighth Circuits have applied its ruling to brief trial recesses. *United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977); *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980); *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976); *United States v. Vesaas*, 586 F.2d 101 (8th Cir. 1978) (dictum). So have state courts. *People v. Phillips*, 77 A.D.2d 927, 431 N.Y.S.2d 99 (2d Dept. 1980); *People v. Narayan*, 76 A.D.2d 604, 431 N.Y.S.2d 556 (2d Dept. 1980) (instruction preceded routine recess, was not modified prior to evening recess); *Jackson v. United States*, 420 F.2d 1202 (D.C. 1979); *Stripling v. State*, 349 So.2d 187 (Fla. App. 1977).[9]

Although admitting that the instruction here was wrong and "should not again be given," (App. A, p. 16a), the Court of Appeals for the Second Circuit refused to follow the holdings of the Fourth, Fifth, Sixth, and Eighth Circuits. Instead it affirmed Mr. DiLapi's conviction on a theory that the interference with Mr. DiLapi's right to counsel was harmless.

Even if the offending instruction here applied to only a brief recess, it requires reversal. This Court has long recognized that violations of the right to counsel are *per se* reversible error: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942). We know of no case in which this Court has retreated from that reasoning and held that denial of the right to counsel during

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[9]Prior to *Geders*, the Third Circuit had also held that any instruction to a defendant not to consult with his counsel during trial was *per se* reversible error. *United States v. Venuto*, 182 F.2d 519 (3d Cir. 1950). *But see, Bailey v. Redman*, ____ F.2d ____, dkt. no. 81-1156 (3d Cir., August 6, 1981) (denying petition for writ of habeas corpus where defendant made no objection to the offending instruction). We are informed that the defendant in *Bailey* will be submitting a petition for a writ of certiorari within the next few weeks raising the *Geders* issue.

trial did not require automatic reversal. Certain rights, including the right to the assistance of counsel, are "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). *See also, Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

The notion of a harmless deprivation of right to counsel not only lacks any judicial support, it is difficult even to conceive. It would be pure guesswork to try to assess the value and impact of attorney consultations that never occurred and legal advice that was never given. As this Court stated in *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978), such an inquiry into what an attorney was compelled to refrain from doing "would require ... unguided speculation." The courts simply have no means of determining how important, valuable, or useful a privileged consultation with counsel might have been.

Recognizing the impracticality of speculating about the prejudicial effect of an unknown, every other circuit that has considered the issue since *Geders* has adopted a rule of automatic reversal. The Second Circuit cited these contrary decisions from the Fourth, Fifth, Sixth and Eighth Circuits, but rejected them without even trying to distinguish or refute them.

Not surprisingly, however, the Second Circuit indicated it was not altogether sure it had reached the correct result. It wrote:

> "There is some force to the contention that reversal should always occur because attempts to demonstrate how helpful a consultation would have been may themselves risk some impairment of the right to effective assistance of counsel by intruding upon protected confidences. On the other hand, with the Supreme Court having explicitly limited its holding in *Geders* to an overnight recess and the disapproval

> expressed in our prior decision in *Leighton* [10] having concerned a lunch recess, we are reluctant to say in the present state of the law that the erroneous instruction requires an automatic reversal in this case." 651 F.2d at 148.

This is, we submit, the Court of Appeals' invitation to this Court to grant this petition for a Writ of Certiorari.

This Court should grant the petition to resolve the clear conflict among the circuits and re-affirm its long-standing rule that a deprivation of the right to counsel requires reversal of a conviction.

B. The Instructions to Mr. DiLapi and to Defense Counsel Prior to Trial Concerning Material Evidence and Witnesses

The district court here placed two substantial roadblocks in the path of Mr. DiLapi's defense. First, it prevented Mr. DiLapi from discussing certain material evidence -- the authorization cards -- with his attorneys.

Second, it prevented defense counsel from communicating with material witnesses except by writing to them and stating that the witnesses need not even speak with defense counsel, but that if the witnesses wanted to be interviewed, they should telephone for an appointment. The trial court imposed this restriction in the teeth of the Court of Appeals' issuance of a writ of mandamus directing it to permit counsel to interview witnesses wherever they could be found.

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[10] *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968). In that case, decided nine years before *Geders*, the Second Circuit declined to order a new trial absent a showing of actual harm from a denial of the right to counsel. *Leighton* was the main authority for the Fifth Circuit's erroneous decision in *Geders*, reported *sub nom. United States v. Fink*, 502 F.2d 1 (5th Cir. 1974), which was reversed by this Court. Since this Court's decision in *Geders*, no court has cited *Leighton*'s actual harm test with approval – until the decision below.

The interposition of the trial court -- between defense counsel and potential witnesses and between a defendant and his lawyers -- with regard to evidence that both courts below found were material to adequate preparation of a defense, deprived Mr. DiLapi of his rights under the Sixth Amendment.

One of defense counsel's most basic functions is to obtain facts helpful to the defense by interviewing potential witnesses prior to trial. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of [a] case .... Facts are the basis of effective representation." *The Defense Function*, American Bar Association Project on Standards for Criminal Justice (1971), Section 4.1, Standard and commentary.

Interference with this defense function -- either by the prosecutor or by the courts -- is an unconstitutional deprivation of a defendant's rights. *International Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975); *Gregory v. United States*, 369 F.2d 185, 188 (D.C.Cir. 1966), *aff'd after remand*, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969); *Coppolino v. Helpern*, 266 F.Supp. 930 (S.D.N.Y. 1967).

What potential witness, having received the chilling notice required by the district court here -- a *Miranda*-type warning that he is authorized not to "get involved" -- would then decide to involve himself in a criminal proceeding? Experience here confirmed what common sense indicates -- of the 160 witnesses to whom the letters were written at the trial court's insistence, only two chose to be interviewed.[11]

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[11]The district court's order was totally unauthorized by any rule and unsupported by any findings. For that reason, too, it was improper. *Gulf Oil Co. v. Bernard*, ____ U.S. ____, 101 S.Ct. 2193 (1981). Further, in depriving defendants of an opportunity to see adverse witnesses and participate in preparation for cross-examination, it deprived them of their right to confrontation as well. *Pointer v. Texas*, 380 U.S. 400 (1965); *Mattox v. United States*, 156 U.S. 237, 244 (1895); *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

Mr. DiLapi's Sixth Amendment rights were thus violated by several of the trial court's orders. Whether and to what degree a trial court may interpose itself between a defendant and material witnesses, and between a defendant and his attorney, is an issue of great significance to the bench and bar. Only with the traditional unfettered access to his client and to potential witnesses can defense counsel properly do his job and discharge his obligation to his client and to the court. This Court should review this case to clarify the rights of defendants to the assistance of counsel.

II

The Government's Contemptuous Refusal To Produce Material Evidence, And the Subsequent Discharge of the Jury, Precluded a Second Trial Because (1) The District Court Improperly Invoked Its Contempt Power Rather Than Dismiss the Indictment; (2) Jeopardy Attached When the First Jury Was Discharged; and (3) Mr. DiLapi Was Deprived of His Right to a Speedy Trial.

A. The District Court Erred In Invoking Its Contempt Power to Compel the Government to Produce Documents Rather Than Dismiss the Indictment.

When the Government disobeyed the district court's order to produce the authorization cards, on what was to have been the first day of trial, the indictment against Mr. DiLapi should have been dismissed.

It is for the Government to decide whether it values its interest in keeping evidence secret above its interest in proceeding with a prosecution. That Government decision is not subject to review by the judicial branch.

This Court enunciated that rule in *Jencks v. United States*, 353 U.S. 657, 672 (1957), saying:

> "We hold that a criminal action must be dismissed when the Government, on the ground of privilege,

> elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States*, 353 U.S. 53, 60-61. *The burden is the Government's, not to be shifted to the trial judge,* to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." (Emphasis added).

It was therefore improper for the trial court below to force the Government's hand by use of its contempt power.

The line of authority for this proposition dates from the decision of Judge Learned Hand in *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). That case, like this one, was "a criminal prosecution, founded upon those very dealings to which the documents [sought by defendants] relate . . . ." 142 F.2d at 506. Judge Hand wrote for the court the words that have since become the classic statement of the rule:

> "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." Id.

See, United States v. Reynolds, 345 U.S. 1, 12 (1953):

> "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

Thus, once the trial court here found that the documents improperly withheld by the Government were material to Mr. DiLapi's defense, the constitutional requirement was unambiguous: the indictment should have been dismissed.

B. Mr. DiLapi Was Twice in Jeopardy

The district court, over defendants' objections, disregarded *Jencks* and invoked its contempt power to compel the Government to change its mind and produce the evidence. When the Government persisted in its contumacy, the trial court, again over defense objections, discharged the jury. When, over a year later, a new trial commenced before a second jury, the defendants were placed in jeopardy a second time.

The fundamental rationale of the double jeopardy clause, Justice Black wrote,

> "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Greene v. United States*, 355 U.S. 184, 187-88 (1957).

Greene and other cases have emphasized the long-established view that the clause's "prohibition is not against being twice punished, but against being twice put in jeopardy . . . ." *United States v. Ball*, 163 U.S. 662, 669 (1896).

This Court's most recent analysis of the reasons underlying the double jeopardy clause describes its "foundation" as the defendant's "valued right to have his trial completed by a particular tribunal," and his "valued right to continue with the chosen jury." *Crist v. Bretz*, 437 U.S. 28, 36, 38 (1978), *quoting United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). *See, Wade v. Hunter*, 336 U.S. 684, 689 (1949).

Because of the variety of circumstances in which double jeopardy issues arise, each case must turn on its own facts. *Illinois v. Somerville*, 410 U.S. 458, 464 (1973). But, in all cases, the double jeopardy clause must be applied in light of its "foundation": the defendant's "valued right" to continue with a chosen jury. *Crist v.*

Bretz, 437 U.S. at 36. The importance of that protection is so great that the courts must "resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.' " *Downum v. United States*, 372 U.S. 734, 738 (1963), quoting *United States v. Watson*, 28 Fed. Cas. 499, 501 (S.D.N.Y. 1868).

The double jeopardy question presented by this case is a narrow but important one on which this Court has never ruled: Can jeopardy ever attach before a jury is sworn? The Second Circuit, recognizing that this Court has never explicitly ruled on the issue, felt itself bound by its prior decision in *United States v. Wedalowski*, 572 F.2d 69 (2d Cir. 1978), and held it cannot. (App. D).

The Second Circuit did recognize that this Court's decision in *Crist* does support Mr. DiLapi's position. *Crist* held that jeopardy attaches no later than the empaneling and swearing of the jury. Five of the six members of the majority joined in an opinion that fixed the point of jeopardy based on "the defendant's 'valued right to have his trial completed by a particular tribunal' " and "the defendant's interest in retaining a chosen jury." 437 U.S. at 36, 38.

Justice Blackmun, concurring, pointed out that the majority's rationale leads inevitably to the conclusion – urged by Mr. DiLapi here – that in an appropriate case jeopardy would attach *before* the jury was sworn. *Crist*, 437 U.S. at 38.

The rationale of *Crist* requires a finding that, in the case at bar, jeopardy attached after the jury was chosen, even though the jury was not sworn.

In this case, both sides completed the process of selecting the jury. Their ability to alter the composition of that jury ended on January 5, 1979, when the last alternate was selected and all parties announced the jury was satisfactory. For the next week, that jury sat together, faced the defendants, and received instructions. The reason that it was not sworn was that the

prosecution -- clearly concerned about the possibility that the case would be dismissed after it disobeyed the court's order to produce material evidence -- asked that it not be sworn. Protection of defendants against such prosecutorial manipulation is a specific objective of the double jeopardy clause.[12]

The Government chose to preserve the secrecy of its evidence rather than proceed with the trial. *Jencks* and *Andolschek* specifically authorized such a choice. But in making that choice after the jury was chosen, the Government compelled the district court to terminate the trial. After the Government's privilege claim was rejected, it sought to change its choice and proceed with the prosecution. That option is not available: it violates defendants' right to avoid multiple prosecutions for the same offense.

* * *

For these reasons, we submit that the answer to the open constitutional question is that in an appropriate case -- at least where the jury is chosen and the trial is aborted because of Governmental misconduct -- jeopardy can attach before the jury is sworn.

The issues raised by this case go to the heart of the meaning of the double jeopardy clause. The Government's position -- that, if it is displeased with rulings

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[12]There is ample precedent that jeopardy attaches, and a second prosecution is forbidden, when a first trial aborts because of the Government's inability to proceed with trial. In *Downum v. United States*, 372 U.S. 734 (1963), defendant's first trial ended before any testimony was taken, because a prosecution witness was unavailable. This Court reversed the conviction that resulted when the missing witness was located and a new jury was empaneled to try the case. This case is far stronger than *Downum*, where the infirmity that aborted the trial was beyond the Government's control. Here, it was the Government's intentional misconduct that halted the trial. Even if Mr. DiLapi's first trial were considered a mistrial, the Government cannot demonstrate the "manifest necessity" required to permit retrial. *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

on motions after the jury is chosen, it may get a fresh start by delaying administration of the jurors' oath -- raises grave possibilities of prosecutorial abuse and emphasizes the need for a prompt ruling on this issue.

C. The Government's Contempt Also Deprived Mr. DiLapi of His Right to a Speedy Trial

The speedy trial question presented by this case may fairly be stated as follows: May the Government, by contemptuously disobeying a court order to produce material evidence; and the trial court, by erroneously refusing at that point to dismiss the indictment, make a defendant choose between his right to a fair trial and his right to a speedy trial? No weightier speedy trial issue is likely to be presented to this Court.

Mr. DiLapi's second trial began 23 months after he was arrested. Virtually all of this delay resulted from the Government's unpreparedness and its contempt of court.

Mr. DiLapi was arrested in May 1978. When the Government was unprepared to give him a timely preliminary hearing, the charges against him were dismissed. He was then indicted in September, 1978.

From November, 1978, until January, 1979, the trial was delayed because the Government sought and obtained additional time to produce documents.

From January, 1979, until November, 1979, the trial was delayed because of the Government's contemptuous disobedience of the district court's order to produce material evidence.

All this delay is directly attributable to the Government. The trial that was to have begun in November 1978 would have proceeded to a conclusion had it not been obstructed first by the Government's request for additional time to produce documents and then by the Government's contemptuous refusal to produce those

documents. The district court recognized as much by including in its contempt order the specific finding that the Government's actions constituted a "continuing impediment" to the trial of the case.

The significance of this delay is emphasized by a letter the prosecutor wrote to the district court on January 22, 1979. The prosecutor argued in that letter that, *even on his view of the case*, forty-five days of delay were chargeable to the Government under the Speedy Trial Act, and dismissal was not required thereunder if trial proceeded within thirty-five more days, *i.e.*, by February 26, 1979. In fact, Mr. DiLapi's trial did not begin until fourteen months later.

Under these facts, dismissal of the indictment was required under both the Speedy Trial Act and the Sixth Amendment.

The Speedy Trial Act

The Government argued below, without citation of authority, that the delay caused by its contempt of court was excludable under the Act in the "interest of justice." 18 U.S.C. § 3161 (h)(8)(A). The district court agreed, and evidently so did the Court of Appeals, though it did not address the issue.

The Government cited no authority in support of its position, and we know of none.

The prime issue under the Act, on which this Court has not written, is thus whether Governmental misconduct that is condemned as contempt of court by the district court and the Court of Appeals, can be deemed to be "in the interest of justice" within the meaning of the Speedy Trial Act.

The Sixth Amendment

The same result flows from an application of the Sixth Amendment criteria set forth in *Barker v. Wingo*, 407 U.S. 514 (1972):

(1) Reason for the Delay. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Barker v. Wingo*, 407 U.S. at 531. The reason for the delay in this case was that the Government chose contemptuously to disobey a direct order by the district court to produce material evidence.

(2) Objection to the Delay. Mr. DiLapi argued that discharge of the jury would lead to a violation of his speedy trial rights.

(3) Length of the Delay. The length of the delay caused by Government misconduct was fourteen months – a period well in excess of delays that have been determined to be impermissible in other cases. *E.g., United States v. Butler*, 426 F.2d 1275, 1277 (1st Cir. 1970), *cert. denied*, 401 U.S. 978 (1971).

(4) Prejudice. Because the reason for the delay was Governmental misconduct, no showing of prejudice is required. "[W]here the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial." *Murray v. Wainwright*, 450 F.2d 465, 471 (5th Cir. 1971).[13] In addition, the Government's ill-advised actions deprived Mr. DiLapi of his "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689 (1949) – the jury that he chose in January 1979.

In response to this Sixth Amendment argument, the Government argued below that it was the NLRB that was held in contempt of court, not the prosecutor, and that the delay caused by the NLRB's misconduct could not be imputed to the Government.

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[13]See also, *Alo v. United States*, 414 U.S. 919, 922 (Justices Douglas, Brennan and Marshall dissenting from denial of petition for a writ of certiorari).

This "not my act" argument should not be countenanced. The ultimate responsibility for any Government-caused delay rests with the prosecution. *Barker v. Wingo*, 407 U.S. 514 (1972). The prosecution cannot escape responsibility for deprivation of a defendant's rights by shifting the blame to another governmental agency. "A citizen has the right to expect fair dealing from his government, and this entails ... treating the government as a unit rather than as an amalgam of separate entities." *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972).

* * *

The Government in this case chose to disobey a direct order of the trial court to turn over material evidence to a defendant. By making that choice, the Government necessarily also chose to forego prosecution. Even if the prosecution could be salvaged, the Government must be held strictly accountable for the consequences of its contumacy. Mr. DiLapi was deprived of the jury he selected in January 1979 and he was required to live under the burden of an impending second trial for more than a year thereafter. His conviction cannot be squared with either the double jeopardy guarantee or with his right to a speedy trial.

III

The Second Circuit's Evidentiary Standards for Sentencing Violated Mr. DiLapi's Constitutional Rights and Conflict With the Decisions of This Court and of Other Courts of Appeals

In sentencing Mr. DiLapi to two consecutive maximum terms of imprisonment, the trial court relied in large measure upon hearsay testimony about what unidentified informants evidently told Government witnesses about Mr. DiLapi's associations.

Pursuant to evidentiary standards existing only in the Second Circuit, after Mr. DiLapi was convicted, he was then "convicted" at his sentencing hearing of being a member of "organized crime." Critical to that second "conviction" was testimony by a person or persons unknown to Mr. DiLapi – testimony which, if subjected to cross-examination, could have been exposed as based upon personal dislike or a misconception of Mr. DiLapi's relationship with others.[14]

We submit that any system of sentencing that permits a citizen to be imprisoned upon hearsay declarations of unidentified, and quite possibly unreliable, "sources", substantiated by evidence that a defendant has a "bad" cousin or belonged to a union with a "bad" member, is fundamentally at odds with the Bill of Rights.

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[14]The prosecution called four witnesses at the sentencing hearing. Two of them did not even mention Mr. DiLapi's name or refer to him in any way. The other two testified only that an unidentified informant had once told them that Mr. DiLapi was a member of a "crime family." One witness testified that his informant, whom he had known for a year, once mentioned Mr. DiLapi in a short conversation in 1977 and never mentioned Mr. DiLapi again. The second witness testified that, in twenty-one years in the organized crime control bureau, he had never heard of Mr. DiLapi until the preceding month – when he made specific inquiries at the request of the prosecutor in this case. Neither witness provided any information about how long Mr. DiLapi was supposedly a member of any crime family or what Mr. DiLapi was supposed to have done. The worst they could say was that their informants had told them that Mr. DiLapi had ties to two members of "organized crime" - one who, it became clear at the hearing, was Mr. DiLapi's cousin, and another who once belonged to Mr. DiLapi's union. There was no indication in the testimony that even the unidentified informant claimed to have any personal knowledge of Mr. DiLapi's activities – and of course the hearsay nature of the testimony precluded any cross-examination on that issue. Thus, in short order, Mr. DiLapi was transformed from a citizen with a clean record to a member of organized crime, based upon conclusory hearsay testimony of little worth, and on a theory of guilt by association.

In basing its sentencing decision on such evidence, the trial court followed standards established by the Second Circuit in *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), which permit use at sentencing of out-of-court declarations by unidentified informants.

Fatico relied heavily upon this Court's 1949 decision in *Williams v New York*, 337 U.S. 241, which held it was not a denial of due process for a sentencing court to rely upon information supplied by witnesses whom the accused could neither confront nor cross-examine. The Second Circuit in *Fatico* took the view that *Williams* was neither overruled nor narrowed by *Gardner v. Florida*, 430 U.S. 349 (1977). In doing so, it reversed a thoughtful opinion of Chief Judge Jack Weinstein of the Eastern District of New York.[15]

Williams took the view that the sentencing proceeding was so different from a trial that due process guarantees did not apply at the sentencing stage. This Court has substantially retreated from *Williams* in the past thirty years. *See e.g., Specht v. Patterson*, 386 U.S. 605 (1967), providing due process protections at any hearing where sentence may be imposed based on "a new finding of fact ... that was not an ingredient of the offense charged." 386 U.S. at 608. Only last term, this Court relied on *Specht* in applying the double jeopardy clause to a sentencing hearing. *Bullington v. Missouri*, ____ U.S. ____, 101 S.Ct. 1852 (1981). *See also, Estelle v. Smith*, ____ U.S. ____, 101 S.Ct. 1866 (1981).

In *Gardner v. Florida*, 430 U.S. 349 (1977), this Court recognized that "there have been ... constitutional developments which require us to scrutinize...sentencing

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[15] *United States v. Fatico*, 441 F.Supp. 1285 (E.D.N.Y. 1977), *rev'd*, 579 F.2d 707 (2d Cir. 1978), *on remand*, 458 F.Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

procedures more closely than was necessary in 1949." 430 U.S. at 357. "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358.

The right to confront and cross-examine adverse witnesses is now recognized to be one of the "minimum requirements of due process." *Morrissey v. Brewer*, 408 U.S. 471 (1972). It applies, *inter alia*, to parole revocation hearing, *Morrissey, supra*, and to probation revocation hearings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), because both "result in a loss of liberty." *Gagnon*, 411 U.S. at 782.

Sixth Amendment law, too, has developed considerably since 1949, when *Williams* was decided. In 1959 this Court in *Greene v. McElroy*, 360 U.S. 474, emphasized the extraordinary value our constitutional system attaches to the right of confrontation. In 1965, *Pointer v. Texas*, 380 U.S. 400, reiterated the fundamental importance of that right and held that it includes the right of cross-examination.

The question now presented is whether the evolving standards under *Specht, Pointer, Morrissey, Gagnon* and *Gardner* require that the right of confrontation apply to a sentencing hearing where the prosecution seeks to increase a sentence by proving a new "fact ... that was not an ingredient of the offense charged." *Specht, supra*, 386 U.S. at 608.

We submit that the confrontation and due process clauses require, at the least, that *either* a defendant must be permitted to confront and cross-examine the "sources" of information offered by the Government in support of an increased sentence, *or* the Government must adduce sufficient independent non-hearsay proof to establish, clearly and convincingly, that (a) the "source" is reliable and has personal knowledge of

the information in question and (b) the hearsay information itself also is reliable.[16]

That in effect was the rule established by the Court of Appeals for the Ninth Circuit in *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). There, the district court had relied on information from unnamed informers that the defendant was the "chief supplier" of drugs to a certain area. The Ninth Circuit vacated his sentence, holding that it was impermissible to base it upon "information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." 448 F.2d at 634.

The Court of Appeals for the District of Columbia Circuit has adopted the reasoning of *Weston*. *United States v. Bass*, 535 F.2d 110 (D.C.Cir. 1976).

The Second Circuit in effect has rejected the standard set forth in *Weston* and *Bass*. Although it paid lip service to *Weston*, it has merely required that there be some "corroboration" of the hearsay evidence before that evidence may be relied upon in the sentencing decision. *Fatico*, 579 F.2d at 713. As witness the decision below, the "corroboration" required by the Second Circuit is minimal.

The Second Circuit's *Fatico* standards are offensive to constitutional principles and contrary to the standards used by other United States Courts of Appeals. Surely, those standards as applied to Mr. DiLapi are unconstitutional.

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[16]With regard to Mr. DiLapi, the Government did neither. There was no evidence at the sentencing hearing that any unidentified informant had any personal knowledge of Mr. DiLapi; for all anyone could tell, the informant could have been reporting third- or fourth-hand hearsay or worse. Likewise, there was little or no corroboration of his testimony.

The judiciary has a compelling interest in assuring the fairness of the sentencing process. The Second Circuit's evidentiary standards give too little regard for Fifth and Sixth Amendment values. Both society and individual defendants have a significant stake in having that procedure reviewed by this Court.

Conclusion

To resolve the split in the circuits regarding the application of *Geders v. United States*; to address issues left open by that case and *Crist v. Bretz*; to determine the extent to which a court may interpose itself between a defendant and his counsel, and his counsel and potential witnesses; to clarify the limits of a court's contempt power where the Government refuses to produce evidence; to assess the impact on a defendant's right to a speedy trial where the Government's contempt causes a lengthy delay; to determine the applicability of constitutional standards to a sentencing hearing; and, not least, to rule in a case where a defendant was unjustly tried and unfairly sentenced, we urge this Court to grant this petition.

Respectfully submitted,

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October 16, 1981

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY DiLAPI and BENJAMIN LADMER
Defendants-Appellants.

Nos. 636-8, Docket 80-1337, 80-1373, 80-1375

Argued Feb. 4, 1981
Decided June 9, 1981

Ronald Meister, New York City (Daniel J. Kornstein and Kornstein, Meister & Veisz, New York City, on the Brief), for defendant-appellant Anthony DiLapi.

Gerald L. Shargel, New York City (Graham Hughes, New York City, on the Brief), for defendant-appellant Benjamin Ladmer.

James Harmon, Jr., Organized Crime Strike Force, Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., Thomas P. Puccio and Douglas Eric Grover, Organized Crime Strike Force, Brooklyn, N.Y., on the Brief), for appellee.

Before FEINBERG, Chief Judge, NEWMAN, Circuit Judge, and MISHLER,* District Judge.

Following affirmance, 616 F.2d 613, of a district court order refusing to dismiss on double jeopardy grounds, defendants were convicted in the United States District Court for the Eastern District of New York, Henry

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* The Honorable Jacob Mishler of the United States District Court for the Eastern District of New York, sitting by designation.

Bramwell, J., of obstruction of justice and conspiracy. Defendants appealed. The Court of Appeals, Newman, Circuit Judge, held that: (1) the issuance of a mandate from the Court of Appeals terminated that court's jurisdiction of the interlocutory appeal and the district court then had jurisdiction to move forward with the trial; (2) the record established that the jury was not confused as to the requirement of a unanimous verdict; (3) where the jury did not indicate any preference for recording a partial verdict, the district court's failure to instruct that it had the right to do so was not erroneous; (4) barring defendant from consulting with his counsel during a five-minute recess in the midst of the prosecutor's cross-examination of defendant was harmless error; (5) the giving of a prior similar act instruction was harmless error.

Affirmed.

Mishler, J. filed a concurring opinion.

NEWMAN, Circuit Judge:

Appellants Anthony DiLapi and Benjamin Ladmer were convicted by jury trial in the Eastern District of New York (Henry Bramwell, Judge) for obstruction of justice and conspiracy to commit that offense, 18 U.S.C. §§ 1505 and 371 (1976), in connection with filing of a representation petition with the National Labor Relations Board (NLRB). Appellants raise several challenges on appeal including claims that the verdict may not have been unanimous and that the Sixth Amendment was violated by an instruction to DiLapi not to consult with counsel during a trial recess in the course of his testimony. Concluding that none of the claims warrants reversal, we affirm the convictions.

I.

In 1978, Matthew Eason, a union organizer and president of Local 20408 of the United Warehouse Industrial and Affiliated Trades Employees Union, filed a representation petition with the NLRB for certification as the collective bargaining agent for the

employees of two employment agencies, GS Temporary Service, Inc. and GS Supply Associates, Inc. (hereafter collectively "GS"). GS provided employees for Interstate Dress Carriers, Inc. ("Interstate"). GS was apparently formed at Interstate's request after Interstate had entered into a collective bargaining agreement with the International Ladies Garment Workers Union (ILGWU) at the end of 1976. At that time, approximately three-quarters of Interstate's employees at its Jersey City facility were transferred to the payroll of GS. Since GS provided these employees to Interstate as "temporary help," they were no longer covered by the union contract with Interstate.

Soon after Eason filed his petition to have Local 20408 represent the GS employees, he received several telephone messages from appellant DiLapi, an organizer for Local 522 of the International Brotherhood of Teamsters. Eason eventually agreed to meet DiLapi to discuss the GS petition at Eason's office on April 12, 1978. The core of the trial concerned this and various other meetings between Eason and appellants at which appellants allegedly attempted to induce Eason to withdraw the petition by means of threats, bribes, and an offer of ILGWU membership for GS employees to be designated by Eason.

Just before the April 12 meeting, co-defendant David Bergner, an attorney whose office was on the same floor as Eason's office, approached Eason and told him that the persons Eason was about to meet were "nasty boys," affiliated with organized crime, who "would think nothing of handing [Eason his] head" if he did not cooperate. After Bergner left, DiLapi arrived with appellant Ladmer, co-defendant Stephen Kingston, president of DiLapi's Local, and a fourth, unidentified individual. Ladmer, an officer of the International Production, Service and Sales Employees Union, had met Eason in 1977 in connection with the withdrawal of a different NLRB petition involving the A.R. Winarick

Company. The president of Ladmer's union, co-defendant Robert Rau, had, at DiLapi's request, asked Ladmer to introduce DiLapi to Eason.

After the introductions, at DiLapi's request the others withdrew, and DiLapi then offered Eason $1,000 to withdraw the GS petition and threatened him with harm if he would not do so. Eason told DiLapi he would have to think about it, and the meeting ended. Ladmer returned and, outside of DiLapi's presence, offered Eason $300 as a payment for the way he had cooperated with Ladmer in their prior dealing involving the Winarick petition. After the meeting, Eason contacted various law enforcement and government agencies and was put in touch with the Federal Bureau of Investigation (FBI). Eason agreed to continue to meet with DiLapi and record all subsequent conversations. The tapes of those conversations were entered into evidence at the trial.

In the first taped conversation, a meeting on April 20 between Eason and DiLapi, DiLapi repeated an offer made earlier to admit 10 GS employees, designated by Eason, into Local 102 of the ILGWU, and mentioned that he did not want to "press" Eason. As no further meetings were planned, Eason spoke to an FBI agent and was advised to arrange another meeting. Eason then contacted Ladmer and asked Ladmer to serve as his "intermediary" in arranging another meeting with DiLapi. In that conversation, which Eason recorded, Ladmer agreed to set up a meeting for April 24 in Ladmer's office.

At the April 24 meeting, which was recorded, Eason, Ladmer, and DiLapi discussed how much money Eason would receive for withdrawing the petition. Eason was told not to mention any figures aloud but to write them down on a piece of paper, as DiLapi was apparently concerned that Ladmer's office might be bugged by the FBI. At one point Ladmer indicated on the paper that the amount would be $3,500. DiLapi stated that if Eason

did not cooperate, GS would simply go out of business and regroup under another name, and as a result, the current GS employees would not be rehired.

A few days later Interstate transferred its Jersey City employees to Manhattan, an action calculated to undermine Eason's organizing efforts because his petition only covered Jersey City workers. The following day, Eason met with Interstate's vice-president, Sidney Lieberman, and in a recorded conversation, Lieberman indicated his awareness of the prior approaches by DiLapi and increased the offer to $5,000. He then paid Eason $2,000 "front money" and agreed to place 10 men of Eason's choosing into ILGWU Local 102, in exchange for withdrawal of the petition. Interstate and Lieberman, along with ILGWU Local 102 and its manager, Sidney Gerstein, were also charged as co-defendants in this case.

All of the defendants testified at the trial, attempting to offer a theory to contradict the Government's contention that the defendants corruptly sought to induce the petition's withdrawal at the request of the employer Interstate. Defendants maintained that DiLapi's union, Local 522, wanted to organize the GS workers, and that they were merely offering to compensate Eason's union for actual expenses incurred in its organizing efforts if it withdrew in favor of Local 522.

The indictment alleged in the substantive count (Count One) that both appellants and others endeavored to influence, obstruct, and impede the administration of the law under which the GS representation proceeding was being conducted by the NLRB. Count One alleged that the obstruction of justice was accomplished by several acts—offering and paying Eason a sum of money, offering membership in Local 102 to persons designated by Eason, and threatening Eason with physical harm, economic injury, and the employees' loss of employment if he did not withdraw the GS

petition. The District Judge's instructions made clear that a request to withdraw a representation petition would be a crime only if it were made corruptly or by threats of force, and that the endeavor would be corrupt if, through payment of money to Eason or admission of persons into Local 102, the endeavor sought to prevent employees from organizing or to preserve a system of kickbacks. By their verdicts of guilty against appellants,[1] the jurors rejected the defense claim that reimbursement of expenses had been legitimately offered, and accepted the Government's contention that threats or corrupt means had been used in an attempt to force withdrawal of the GS petition.

II.

Trial Court Jurisdiction

Preliminarily, appellants contend that the District Court lacked jurisdiction to conduct the trial because, when the trial started, there was pending in this Court a petition seeking rehearing of an interlocutory appeal. Appellants had initially moved in the District Court to dismiss the indictment on grounds of double jeopardy. That motion was denied, and, upon an interlocutory appeal, *see Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, L.Ed.2d 651 (1977), this Court affirmed. *United States v. DiLapi*, 616 F.2d 613 (2d Cir. 1980). The opinion of affirmance was filed February 19, 1980, and contained a direction that the mandate issue "forthwith." The records of this Court reflect that the mandate in fact issued on February 21, 1980. Subsequently a timely petition for rehearing was filed pursuant to Fed.R.App.P. 40. Appellants moved in this Court to stay the trial, and this Court denied that motion

[1] Four defendants, Bergner, Kingston, Rau, and Interstate, were acquitted. Of the remaining three defendants, Lieberman was severed because of his illness mid-trial, and he is awaiting trial. ILGWU Local 102 pleaded *nolo contendere* to one count of impeding the performance of duties of the NLRB in violation of 29 U.S.C. § 162 (1976), and the charges against Gerstein were dismissed.

on April 18, 1980. Trial commenced April 21, 1980. The petition for rehearing was denied April 28, 1980.

The issuance of the mandate from this Court terminated this Court's jurisdiction. *Gradsky v. United States*, 376 F.2d 993 (5th Cir.), *cert. denied sub nom. Grene v. United States*, 389 U.S. 908, 88 S.Ct. 224, 19 L.Ed.2d 224, *vacated in part on other grounds sub nom. Roberts v. United States*, 389 U.S. 18, 88 S.Ct. 1, 19 L.Ed.2d 18 (1967); *United States v. Eisner*, 323 F.2d 38, 42 (6th Cir. 1963). The filing of a petition for rehearing did not revest jurisdiction in this Court, as appellants apparently recognized by moving to stay the trial. Had this Court been disposed to grant the petition it would have had to recall the mandate.[2] In the absence of a recall of the mandate or a stay of the trial, the District Court was entitled to exercise the jurisdiction it acquired upon the issuance of the mandate from this Court.[3]

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[2] A motion to recall a mandate is not specifically provided for in the Federal Rules of Appellate Procedure, but was expected by the draftsmen to be available, *see* Advisory Committee Note to Fed. R. App. P. 37 (recall of mandate to make provision for interest), pursuant to Fed. R. App. P. 27. *See* 9 Moore's Federal Practice para. 241.02[4] (2d ed. 1980). Presumably, no reacquisition of appellate jurisdiction is needed to deny a petition for rehearing filed after issuance of a mandate. *Cf.* Fed R. Crim. P. 33 (when appeal is pending in the court of appeals, district court requires remand to grant a motion for new trial, but not to deny such motion).

[3] The record does not disclose when the mandate from this Court was filed in the District Court, and appellants make no complaint concerning the filing of the mandate in the District Court. We rely upon the issuance of the mandate from this Court as the event that returned jurisdiction to the District Court. However, prompt filing of the mandate in the District Court would be the better practice to provide an official notice in the records of that court. Such filing is the significant event for purposes other than reacquiring jurisdiction, *see, e.g.*, Fed. R. Crim. P. 35(b) (measuring the 120-day period for motion to reduce sentence from "receipt" of mandate).

Unanimity of the Jury Verdict

During its deliberations, the jury sent a series of notes to the Court, which led to the note that is the focus of appellants' claim that the verdict may not have been unanimous. The series began toward the end of the second day of deliberations with a jury note (Ex. 15) stating: "We have reached a verdict on four of the defendants. We are sharply and evenly split on the remaining two. We await further instructions from the Court." Defense counsel requested that the jury be asked to return the verdicts they had agreed upon. The District Court refused to ask the jury for a partial verdict and simply instructed the jury to continue deliberating "with a view to reaching a decision on the remaining defendants."

The next day, shortly after the jury resumed deliberating, it requested legal definitions of key terms in the charge, such as "threat," "conspiracy," and "reasonable doubt." It then sent a second note (Ex. 18) indicating its continued deadlock, stating: "We have reached a unanimous decision on seven counts, but remain hopelessly deadlocked on the remaining five counts."[4] The Court again rejected counsel's request to receive a partial verdict and gave the jury a balanced *Allen*[5] charge. Following a further request to hear some of the recordings, the jury sent the note that is the source of appellants' objection. In this note (Ex. 20), the jury asked: "In count one of the indictment, is it necessary to find the defendant guilty of all acts in the indictment to find him guilty, or can they be separated?"

After consulting with counsel, *see United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981), the Court recalled

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[4] The jury's reference to twelve counts presumably reflects its multiplication of the number of counts, 2, by the number of defendants, 6.

[5] *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896).

the jury and responded: "They can be separated." At that point, one juror asked for clarification. The Court responded: "No. They can be separated." Then, apparently preferring to have the request for clarification made precise in written form, the Court added: "Send another note out. They can be separated is the answer." After the jury retired, defense counsel requested that the jurors be specifically instructed that they must be unanimous as to each act they find to be proven. Counsel urged that ambiguity in the question warranted further instruction. The Court declined to charge specifically on unanimity as to acts, expressing the view that the original charge on unanimity sufficed and that the jury could send in another note if it had any further questions or need for clarification.

Within thirty minutes another note (Ex. 21) was received asking: "If a defendant is found innocent under two aspects in count one, and guilty on the rest of the counts [*sic*] under count one, can he be found guilty under count one?" Judge Bramwell read the note to counsel but declined to hear their suggested responses, contrary to the proper practice set forth in *United States v. Ronder, supra*, which was decided after this trial. Then, instead of responding specifically to the jury's inquiry, which is the preferable course, Judge Bramwell answered by rereading to the jury the portions of the original charge concerning the statute, the elements of the offense in Count One, and aiding and abetting. About ten minutes later, the jury requested to be discharged for the evening because it could not reach a decision that night. On the following day, the jury found appellants guilty on both counts.

Appellants contend that the sequence of notes reveals a distinct possibility that the jurors were uncertain as to the requirement of their unanimity and that the District Court's failure to reinstruct specifically on unanimity requires reversal. We disagree. The

original charge included the usual instruction on the requirement of a unanimous verdict, and nothing in the jurors' subsequent inquiries revealed any uncertainty about this requirement. Appellants suggest that the note asking "can they be separated?" (Ex. 20) may have sought to inquire whether conviction could result if some of the jurors found one or more alleged acts to have been established and the other jurors found other acts to have been established. We think that is a strained interpretation of the note. The question in the note asking "can they be separated?" was put as an alternative to the question "is it necessary to find the defendant guilty of all acts in the indictment ....?" The plain import of the note, read as a whole, is that the jurors wanted to know if their unanimous verdict must include a finding of guilty as to all acts charged in Count One, or only one or more of the separate acts charged. Nor is uncertainty as to unanimity reflected by the jurors' subsequent inquiry (Ex. 21) asking whether guilt on Count One can be found even if a defendant is innocent "under two aspects under count one." On the contrary, this inquiry simply reflects the jury's persistent effort to obtain clarification as to whether all alleged acts had to be proved, most likely to have the law convincingly explained to whichever jurors were not sufficiently enlightened by the Court's laconic response to Exhibit 20.[6]

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[6] Appellants also suggest that by permitting conviction upon a finding that less than all of the alleged acts were committed, the District Court permitted the jury to convict even though the appellants may have been found innocent of endeavoring corruptly to influence, obstruct, and impede the proper administration of the representation proceeding. But the District Court's charge made clear that the corrupt endeavor was the gist of the offense, which had to be found beyond a reasonable doubt, and that the alleged acts were the means for accomplishing the endeavor. *Cf. United States v. Amrep*, 560 F.2d 539 (2d Cir. 1977), *cert denied*, 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978).

The record in this case does not disclose ambiguity that would create doubt as to whether the verdicts were unanimous. This case is quite unlike *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), on which appellants rely, where the jurors were instructed that they need not all agree on which one of several specified acts the defendant had committed. In any event, in view of the substantial evidence of appellants' guilt, the failure to reinstruct the jury specifically as to unanimity on the substantive count was, at most, harmless error.[7]

However, we are somewhat troubled by one aspect of the events occurring during the sequence of jury notes—the District Court's response to counsel's suggestion that a partial verdict be received as to some of the defendants. In a multi-defendant trial, the jury is entitled to return a verdict "at any time in its deliberations" as to one or more defendants. Fed.R.Crim.P. 31(b). We have approved the receipt and publication of a jury's partial verdict as to less than all defendants and as to less than all counts. *United States v. Cotter*, 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575 (1932); *see United States v. Frankel*, 65 F.2d 285 (2d Cir.), *cert. denied*, 290 U.S. 682, 54 S.Ct. 119, 78 L.Ed. 588 (1933). Plainly Rule 31(b) would be violated if a trial judge were to tell a jury it may not return a partial verdict or were to refuse a jury's request to return a partial verdict. But that is not what occurred here. Though the jury reported that it had reached verdicts as to some of the defendants, it did not indicate any preference for reporting a partial verdict. The request for return of a partial verdict came from counsel, and it was that request that Judge Bramwell refused.

The difficulties of a jury's task in reaching unanimous verdicts as to several defendants tried on multiple

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[7] In view of our disposition, we do not reach the Government's further contention that unanimity is not required as to specifications of the means by which the crime of obstruction of justice was committed.

charges counsel against judicial attempts to structure the course of jury deliberations. At the same time, the fundamental precept that guilt is individual must be observed in the deliberative process. For this reason, juries in multi-defendant trials are instructed, as this jury was, to give separate and individual consideration to the case against each defendant. *United States v. Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 405 U.S. 928, 92 S.Ct. 978, 30 L.Ed.2d 801 (1972); *United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966); Devitt and Blackmar, *Federal Jury Practice and Instructions* § 11.09 (1977). Regard for these considerations suggests that juries should have considerable latitude in determining for themselves the structure of the deliberative process that will best assure individual consideration of each defendant. The jury's discretion should extend to the timing of reporting its verdicts. If jurors are prohibited from returning a partial verdict as to some defendants, they might mistakenly infer that the individual consideration they had already given to some of the defendants is expected to be reassessed in light of their subsequent deliberations. On the other hand, if they are required to return a partial verdict, there is a risk that some jurors might mistakenly permit a tentative vote to become an irrevocable final vote and forgo the opportunity to gain new insights concerning the evidence in one defendant's case from consideration of the same evidence as it bears upon other defendants.

We think that juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants. In this case, the jury reported that it had reached a decision as to four of the defendants, was divided on the remaining two defendants, and awaited further instructions. At that point, particularly

in view of counsel's request, an appropriate response from the trial judge should have included a neutral explanation of the jury's options either to report the verdicts reached, or to defer reporting of all verdicts until the conclusion of deliberations. Such an instruction should advise the jurors that any verdicts they choose to report will not be subject to later revision. However, the absence of such an explanation did not deny the appellants any protected right in a case such as this where the jury neither attempted to return a partial verdict nor even asked if it could do so. Moreover, the jury's ultimate decision to convict the two appellants and acquit four co-defendants adequately indicates that individual consideration was given to the case against each defendant. *Cf. United States v. Bubar*, 567 F.2d 192, 205 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977).

Restriction on Consultation with Counsel

On the afternoon of the first of two days of appellant DiLapi's testimony, during cross-examination, the prosecutor sought a brief recess and requested that DiLapi "be instructed on cross-examination not to speak with his attorney." The Court instructed Di Lapi that he "not discuss the case until he comes back to the stand," which occurred approximately five minutes later. When counsel objected, the Court responded that it had previously given the "same instruction" to another witness at defense counsel's request, and that "fair is fair." This referred to an episode several days earlier, at the end of a trial day during the cross-examination of a key Government witness, Eason. Defense counsel had asked the Court whether the "usual rule" would prevail that the "witness while under examination should speak to no one." The Court thereupon instructed Eason not to discuss the case with anyone, including the prosecutor, and to "just come back to the stand."

DiLapi maintains that the instruction barring him from any discussion during the recess[8] violated his Sixth Amendment right to assistance of counsel. In *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), the Supreme Court held unconstitutional an instruction that the defendant not consult with counsel during an overnight recess between the defendant's direct and cross-examination. However, the Court noted that it was not deciding the constitutionality of a prohibition on consultation imposed during a brief routine recess. 425 U.S. at 89 n.2, 96 S.Ct. at 1335 n.2. This Court had encountered that situation prior to *Geders* in *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968), in which the defendant was barred from consulting with his counsel during a lunch recess that occurred between the defendant's direct and cross-examination. We disapproved the prohibition in *Leighton*, terming it "plainly uncalled for," *id.* at 823, but declined to order a new trial in the absence of any "actual harm to the right to effective assistance of counsel," *ibid.* In *Geders* the Supreme Court reversed without pausing to inquire as to prejudice, apparently persuaded that foreclosing consultation with counsel inevitably impairs the effective assistance of counsel when the prohibition extends over as long a period as an overnight recess. DiLapi urges us to apply *Geders* to the five-minute recess that occurred here and reverse regardless of whether any identifiable harm resulted. He also contends that there was actual prejudice because

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[8] The Court's reference to its earlier instruction to Eason arguably suggests that the Court intended to restrict DiLapi from consulting with his counsel beyond the five-minute recess. However, we think the record is clear that the instruction did not extend beyond the brief recess and that DiLapi did not think it did. The Government's request was made in the context of a specific brief recess, and the Court's instruction explicitly stated that the prohibition applied until DiLapi returned to the stand. Moreover, neither DiLapi nor his lawyer ever told the District Court they believed themselves barred from consulting beyond the five-minute recess, nor sought relief from any possibly broader prohibition.

he was prevented from discussing with his lawyer a significant event that had occurred earlier in the day, the severance granted to co-defendant Lieberman.

We reaffirm our view, expressed in *Leighton*, that it is error to bar a defendant from consulting with his counsel during any trial recess. The fact that other witnesses were cautioned not to speak to anyone during recesses does not justify a prohibition upon defendant-lawyer conversations. The defendant's Sixth Amendment rights were obviously in effect, and he may consult with his counsel during any recess so long as the orderly conduct of the trial is not impaired.[9]

Whether the error warrants reversal in light of *Geders* is a closer question. Some courts of appeals have applied *Geders* to reverse convictions, without inquiring as to actual harm, when communication between defendant and counsel was barred during brief recesses in the middle of the trial day. *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980) (lunch recess during cross-examination of defendant); *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976) (lunch recess during defendant's direct testimony); *see United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908, 97 S.Ct. 1179, 51 L.Ed.2d 584 (1977) (routine recess; *Geders* applied prospectively because counsel did not object to instruction); *United States v. Vesaas*, 586 F.2d 101, 102 n.2 (8th Cir. 1978) (grave doubts whether brief restrictions during trial recesses can be squared with *Geders*; conviction reversed on other grounds). There is some force to the contention that reversal should always occur because attempts to demonstrate how helpful a consultation would have been may themselves

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[9] There is no claim here that counsel sought to prolong a recess inordinately for extended consultation. Nor do we face, or express any view on, the issue that would arise if a trial judge denied a request for a recess sought during examination of a defendant to enable him to consult with counsel.

risk some impairment of the right to effective assistance of counsel by intruding upon protected confidences. On the other hand, with the Supreme Court having explicitly limited its holding in *Geders* to an overnight recess and the disapproval expressed in our prior decision in *Leighton* having concerned a lunch recess, we are reluctant to say in the present state of the law that the erroneous instruction requires an automatic reversal in this case.

Assessing the significance of the error, we find not even a remote risk of actual prejudice. DiLapi identifies Lieberman's severance as the topic he was prevented from discussing because of the Court's instruction, yet there is not even a suggestion as to how such a conversation on that topic during the recess might have had any bearing on DiLapi's subsequent cross-examination. Even if there is a reluctance to offer such explanation, the fact remains that the severance had occurred earlier in the day, and DiLapi had some opportunity to consult about it while seated at counsel table and during the lunch recess. Moreover, though counsel objected to the instruction, he gave no indication to the District Court that there was some matter requiring consultation, nor did DiLapi request consultation. We note that when a later recess occurred during cross-examination of a co-defendant, the District Court acceded to that defendant's request to consult with his lawyer. In sum, we see no reason, in the circumstances of this case, for ordering a new trial because of the erroneous instruction. We need not determine whether a similar instruction would require reversal in cases arising hereafter without regard to actual prejudice. It is sufficient to state that the instruction should not again be given.

Prior Similar Act Instruction

The District Judge gave an instruction concerning prior similar acts, charging the jury, in

customary language, that while a prior similar act is not evidence of the commission of an act charged in the indictment, the jury could consider evidence of a prior similar act on the issue of intent, once they determined from other evidence that the act charged in the indictment was committed. In colloquy after the charge was given, the Government urged that this instruction was justified because of the $300 payment Ladmer had offered Eason for his cooperation in withdrawing the Winarick petition. Ladmer challenges the instruction, contending that there was no evidence to indicate that the offer of the $300 was illegal and hence it was not a prior act similar to the one charged in the indictment.

Since the offer of $300 was made long after withdrawal of the Winarick petition, it was not similar to the offers charged in the indictment, which were claimed to be corruptly made to induce withdrawal of a pending petition. Indeed, the Government's theory in summation was not that the $300 offer was a prior example of a payment to induce withdrawal of a petition, but rather a gratuity extended to "grease the skids" for receipt of the payments tendered in connection with the GS petition. Thus, the similar acts instruction should not have been given, *see United States v. Torrence*, 480 F.2d 564 (5th Cir. 1973), even though the evidence of the $300 offer was properly admitted as relevant to intent in connection with the GS petition. Nevertheless, the error was harmless. The instruction made no explicit reference to the $300 offer, and the prosecutor's summation, in referring to the offer, did not try to suggest that it was a prior example of wrongful conduct. There was no appreciable risk that the mere giving of the instruction, unrelated to any specific evidence, branded the appellants as persons involved in prior wrongdoing.

We have considered appellants' other contentions and find them to be without merit.

Affirmed.

MISHLER, District Judge, concurring:

I concur. However, my concurrence does not extend to the view expressed in the majority opinion on the Sixth Amendment violation claim.

Though DiLapi's Sixth Amendment rights were clearly in effect at the time of the five minute recess, I am unconvinced that his Sixth Amendment right to effective assistance of counsel precluded the trial judge from directing him not to discuss "the case" with anyone. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." I find that the majority's position—that the Sixth Amendment permits a defendant to "consult with his counsel *during any recess* so long as the orderly conduct of the trial is not impaired," *ante*, at 148 (emphasis added),— is too broad.

Under the circumstances of this case, DiLapi's Sixth Amendment right to counsel was not implicated by the trial court's prohibition. The right to assistance of counsel during defendant's cross-examination while the court is in session is limited to the defense counsel's right, and obligation, to make objection to inappropriate questions and other irregularities which appear during cross-examination.[1] The Sixth Amendment right does not encompass the right to consult counsel during cross-examination. Rather the defendant must rely on, and is amply protected by, the obligation of the court to conduct a fair trial, and its further obligation to preserve the integrity of the judicial process. Accordingly, I find that DiLapi's right to consult with counsel

[1] As the majority points out, *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert denied*, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed. 2d 282 (1968), concerned a prohibition against attorney-client communications during a recess that occurred between the defendant's direct and cross-examination. For the reasons set out in my concurrence, I would qualify the majority's interpretation of *Leighton* in accordance with the view herein set forth.

rested exclusively on his right to a fair trial which is guaranteed by the due process clause of the Fifth Amendment.

In reaching this conclusion, I am guided by *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), as well as an historical interpretation of the Sixth Amendment guarantee of the right to counsel. In *Geders*, the prohibition against consulting with counsel was with respect to an overnight recess. The objection leveled against that direction at trial was based on the belief that defendant's attorney "had a right to confer with his client about matters other than the imminent cross-examination ...." *Geders v. United States*, 425 U.S. at 82, 96 S.Ct. at 1332. The Court did not hold that the Sixth Amendment necessarily afforded defendant the right to discuss his cross-examination with counsel during a trial recess. Rather, the Court determined that because of the variety of important matters relating to all aspects of the trial which are routinely discussed during overnight recesses, the trial judge's attempt to secure "truth and fairness" in the trial process by prohibiting attorney-client consultations when there had been a perceived "risk of improper 'coaching' " must give way to the defendant's Sixth Amendment right to counsel. *Id.* at 97-91, 96 S.Ct. at 1335-37. In suggesting one method for coping with "the problem of possible improper influence on testimony," the Court alluded to the scope of the right to assistance of counsel during brief trial recesses as follows:

> "[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct and cross-examination of a witness will be completed without interruption.
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> Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result ... if a court continues in session several hours beyond the normal adjournment hour .... [However], convenience occasionally must yield to concern for the integrity of the trial itself." 425 U.S. at 90-91, 96 S.Ct. at 1336 (footnote omitted).

The trial judge's power to continue trial without recess for the purpose of preventing an attorney's improper coaching will not accommodate a construction of the Sixth Amendment which guarantees the defendant a right to consult counsel during cross-examination.

The scope of the Sixth Amendment right to counsel has evolved over the years based on the Court's perception of counsel's importance in "guiding" the defendant through the trial process. *See e.g., Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932) (a layman requires the "guiding hand of counsel at every step in the proceedings against him" because of his lack of "skill and knowledge" in the law); *United States v. Wade*, 388 U.S. 218, 225, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149 (1967) (the right to assistance of counsel at pretrial confrontations arises "whenever necessary to assure a meaningful 'defence' "); *United States v. Ash*, 413 U.S. 300, 308-09, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973) (the right derives in part from the "desire to minimize the imbalance in the adversary system"). However, conceding the fact that consultation with counsel by a defendant who is undergoing cross-examination is desirable, and may even be necessary for the purpose of rendering credible testimony, we must also account for the function of cross-examination in the trial process in construing the Sixth Amendment guarantee of counsel.

The age-old tool for ferreting out truth in the trial process is the right to cross-examination. "For two centuries past, the policy of the Anglo-American system

of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). The importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, *see* U.S.Const. Amend. VI (confrontation clause); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965), suggests that the right to assistance of counsel did not include the right to have counsel's advice on cross-examination.

The Court has consistently acknowledged the vital role of cross-examination in the search for truth. It has recognized that the defendant's decision to take the stand, and to testify on his own behalf, places into question his credibility as a witness and that the prosecution has the *right* to test his credibility on cross-examination. *See e.g., United States v. Havens*, 446 U.S. 620, 626-67, 100 S.Ct. 1912, 1916-17, 74 L.Ed.2d 559 (government must be permitted "proper and effective cross-examination ...."), *reh. denied*, 446 U.S. 620, 101 S.Ct. 25, 65 L.Ed.2d 1172 (1980); *Brown v. United States*, 356 U.S. 148, 154-55, 78 S.Ct. 622, 626, 2 L.Ed.2d 822, *reh. denied*, 356 U.S. 948, 78 S.Ct. 776, 2 L.Ed.2d 822 (1958). Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination. *Cf. Brown v. United States*, 356 U.S. at 154-55, 78 S.Ct. at 626, *quoting, Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 949, 44 L.Ed. 1078 (1900) ("[W]e know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses.").

The assistance which accrues to the defendant by virtue of counsel's presence in the courtroom during defendant's cross-examination needs no discussion here. Surely such assistance is consistent with the plain meaning of that term as it is used in the Sixth Amendment right to counsel clause—i.e., "the right of the accused to have counsel acting as his assistant," *United States v. Ash*, 413 U.S. at 312, 93 S.Ct. at 2575,—and, I believe, in the context of the question before us, it adequately "assure[s] fairness in the adversary criminal process." *United States v. Morrison*, ____ U.S. ____, ____, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Accordingly, in light of the relevant history, I conclude that counsel's presence in the courtroom during defendant's cross-examination fully satisfies the Sixth Amendment mandate for the limited purpose indicated.

Having grounded DiLapi's right to confer with counsel while undergoing cross-examination on the Fifth Amendment due process clause, only a showing of a clear abuse of the trial judge's discretion would provide a basis for reversal. *See Geders v. United States*, 425 U.S. at 86-87, 96 S.Ct. at 1334-35. The trial judge, not having abused his discretion, did not violate defendant's right to due process. Accordingly, I find no error in the trial judge's instruction.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, One thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY DiLAPI and BENJAMIN LADMER,
Defendants-Appellants.

No. 80-1337, 80-1373, 80-1375

A joint petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony DiLapi and Benjamin Ladmer,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
A. DANIEL FUSARO
Clerk

Appendix C
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE JOHN S. IRVING, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, A WITNESS UNDER SUBPOENA TO PRODUCE DOCUMENTS,

Appellant.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY DILAPI, ROBERT RAO, SIDNEY LIEBERMAN, BENJAMIN LADMER, STEPHEN KINGSTON, DAVID BERGNER, AND INTERSTATE DRESS CARRIERS, INC.,

Defendants-Appellees.

Nos. 740-741, Dockets 79-1017, 1018

Argued Feb. 7, 1979
Decided April 12, 1979

General counsel of the NLRB appealed from orders of the United States District Court for the Eastern District of New York, Henry Bramwell, J., holding him in contempt of court for failing to comply with a discovery order which was directed to union authorization cards. The Court of Appeals, Werker, District Judge for the Southern District of New York, sitting by designation, held that: (1) one of the contempt orders was criminal and thus appealable; (2) general counsel was not a party to the criminal prosecution so that the civil contempt order could be appealed; (3) trial court did not abuse its discretion in determining that

the union authorization cards might be useful to the defendants in the criminal prosecution, but (4) disclosure of the union authorization cards should be made only to counsel for the defendants.

Affirmed in part, vacated in part, and remanded.

Mansfield, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Susan Tepper Papadopoulos, Mary Schuette, W. Christian Schumann, Peter Winkler, N.L.R.B., Washington, D.C. (John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Norton J. Come, Deputy Associate Gen. Counsel, Paul Elkind, Asst. Gen. Counsel, and Margery E. Lieber, Deputy Asst. Gen. Counsel, Washington, D.C., of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Martin London, Ronald W. Meister and David Dunn, New York City, of counsel), for defendant-appellee Interstate Dress Carriers, Inc.

Edward R. Korman, U.S. Atty., E.D.N.Y. and Thomas P. Puccio, Attorney-in-Charge, U.S. Dept. of Justice, Organized Crime Strike Force, E.D.N.Y., Brooklyn, N.Y. (James D. Harmon, Jr. and Lawrence H. Sharf, Special Attys., New York City, of counsel), for the United States, amicus curiae.

Marchi Jaffe Cohen Crystal & Mintz, New York City (Jay A. Katz, David Jaffe, New York City and David R. Taxin, Washington, D.C., of counsel), for Local 102, ILGWU, amicus curiae.

Before MANSFIELD and TIMBERS, Circuit Judges, and WERKER, District Judge.*

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* Honorable Henry F. Werker, District Judge of the Southern District of New York, sitting by designation.

WERKER, District Judge:

John S. Irving, General Counsel of the National Labor Relations Board, appeals from two orders of the United States District Court for the Eastern District of New York (Bramwell, J.), entered on January 12, 1979, adjudicating Irving to be in contempt of court. The first order imposes a $10,000 fine. The second fines Irving an additional $1,000 per day until he complies with the court's order. A stay pending appeal was granted.

The events leading up to these orders of contempt are as follows. On April 5, 1978, Local 20408, United Warehouse, Industrial and Affiliate Trades Employees Union, filed a representation petition with the Newark Regional Office of the NLRB (the "Board") seeking recognition as collective bargaining agent for certain employees of G.S. Supply Associates, Inc. and G.S. Temporary Service, Inc. employed at a terminal of Interstate Dress Carriers, Inc. ("IDC") in Jersey City, New Jersey. This petition was later amended to include additional IDC employees at terminals in Jersey City and New York.

On September 6, 1978, a criminal indictment was returned in the Eastern District of New York charging nine defendants, including IDC and Local 102, International Ladies Garment Workers Union, with conspiracy and obstruction of an administrative proceeding in violation of 18 U.S.C. §§ 2, 371 and 1505. Included in the charges were alleged efforts to bribe and induce Matthew Eason, president of Local 20408, into withdrawing his petition, threats of physical harm and economic injury against Eason, and threats of loss of employment against the employees of IDC, G.S. Supply and G.S. Temporary Service. After a series of efforts by Local 102 and IDC to obtain production of certain "authorization cards" (*i.e.*, membership applications executed by employees as a showing of interest in having Local 20408 represent them), IDC, on December 29, 1978, served two subpoenas on Board personnel directing

them to produce at the criminal trial on January 3, 1979 all "authorization cards or applications for membership in Local 20408" and "other writings" concerning a "showing of interest" by employees in Local 20408. On January 3, the Board and the prosecution moved to quash on the ground that the cards were privileged.

The district court, on January 8, 1979, denied the motion to quash and ordered the Board to turn the cards over to the defendants. The Board appealed to this court, which, on January 9, 1979, entered an order dismissing the appeal and denying the Board's application for mandamus. *United States v. DiLapi*, 529 F.2d 1209 (2d Cir. 1979). John Irving, General Counsel of the Board and custodian of the cards, nonetheless refused to disclose, and IDC moved for dismissal of the indictment. This motion remains pending in the district court. Irving was held in contempt by Judge Bramwell on January 12, 1979 by two orders, one imposing a flat fine of $10,000 and the second imposing fines of $1,000 per day until he complies. Both orders are now stayed pending the Board's instant appeal from the orders of contempt. Both Local 102 and the United States Attorney for the Eastern District of New York have filed amicus briefs. The record indicates that if the contempt orders are upheld here, the Board will relinquish the cards.

1. Appellate Jurisdiction

We met at the threshold with IDC's argument that neither of the two contempt orders issued below are "final" orders within the meaning of 28 U.S.C. § 1291, and therefore neither are within this court's appellate jurisdiction. Invoking the wellestablished rule that orders of civil contempt against parties to pending proceedings are not appealable, *see Fox v. Capital Co.*, 299 U.S. 105, 107, 57 S.Ct. 57, 81 L.Ed. 67 (1936); *International Business Machines Corp. v. United States*, 493 F.2d 112, 117-19 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974); 15 C. Wright, A.

Miller & E. Cooper, *Federal Practice & Procedure* § 3917 (1976), IDC argues first that both the orders below were orders of civil contempt, and second that the General Counsel to the Board, as part of the government, is "party" to the criminal proceeding below.[1]

With respect to the first order of contempt, imposing a flat fine of $10,000, we conclude that it is an order of criminal contempt and therefore immediately appealable as a final order. *See Union Tool Co. v. Wilson*, 259 U.S. 107, 111, 42 S.Ct. 427, 66 L.Ed. 848 (1922); *International Business Machines Corp. v. United States*, 493 F.2d at 114. The chief characteristic of civil contempt is that its purpose is to compel obedience to an order of the court to enforce the rights of the other party to the action. *Nye v. United States*, 313 U.S. 33, 42, 61 S.Ct. 810, L.Ed. 1172 (1941); *McCrone v. United States*, 307 U.S. 61, 64, 59 S.Ct. 685, 83 L.Ed. 1108 (1939); *International Business Machines Corp. v. United States*, 493 F.2d at 115. Consistent with this remedial purpose, the sanction imposed is generally made contingent on compliance. *Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Penfield Co. v. SEC*, 330 U.S. 585, 590, 67 S.Ct. 918,

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[1] IDC also argues that, even assuming one of the contempt orders is criminal, neither is final because its motion to dismiss the indictment is still pending before the district court, which therefore has not yet finished imposing "sanctions" for the government's refusal to produce the cards. While it is true that a contempt order is not final until sanctions have been imposed, *see* C. Wright, A. Miller & E. Cooper, *supra*, § 3817 at 617, it seems to us that the pendency of a motion to dismiss a criminal indictment based on the prosecution's failure to disclose is unrelated to the contempt sanctions here, which are clearly limited to the fines set forth in the orders below. Should dismissal ultimately become proper, it would not be a sanction stemming from contempt, but rather the vindication of a criminal defendant's right to discovery of evidence material to his defense. *See United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). Even assuming dismissal were deemed a "sanction" of sorts, it would be a sanction running against the prosecution rather than the General Counsel, who is, of course, the contemnor here.

91 L.Ed. 1117 (1947); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). This is often accomplished by a purgation provision, whereby a civil contemnor may purge himself of contempt at any time by compliance. *See generally* C. Wright, A. Miller, J.E. Cooper, *supra*, § 2960. The purpose of an order of criminal contempt, on the other hand, is punitive. It is imposed to vindicate the court's authority. *Nye v. United States*, 313 U.S. at 43, 61 S.Ct. 810; *see generally* Dobbs, *Contempt of Court: A Survey*, 56 Cornell L.Rev. 183, 235-39 (1971). Accordingly, compliance with the court's command will not lift the sanction. In responding to a single contemptuous act, a court may well impose both criminal and civil sanctions—wishing to vindicate its authority and to compel compliance. *Id.* at 236-37.

This is what the district court intended here. In his first order, imposing on Irving a flat fine of $10,000 for "wilful" contempt, Judge Bramwell captioned his order in a criminal contempt format, followed the language of Fed.R.Crim.P. 42(a), and made no provision for purgation. The fine was punitive, levied regardless of subsequent compliance. We find that this order held Irving in criminal contempt and is therefore immediately appealable.

We also find that the second order, which imposes a continuing fine of $1,000 per day and contains a provision for purgation, has coercion as its primary purpose and constitutes an order in civil contempt. Therefore, to determine whether this order is immediately appealable, it is necessary to consider whether Irving, as General Counsel to the Board, is a "party" to the criminal proceeding below.

IDC, viewing the "government" as a monolith, argues in effect that the government (*i.e.*, the Justice Department) is prosecuting the criminal action below, and therefore, the government (*i.e.*, the General Counsel

to the Board) is "party" to the action. Refining this argument somewhat, IDC cites authority indicating that the duty of disclosure in criminal cases affects not only the prosecutor but the government as a whole. *See United States v. Caldwell*, 148 U.S. App.D.C. 20, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *United States v. Bryant*, 142 U.S.App.D.C. 132, 439 F.2d 642, 650 (1971); *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948). *See also Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 754 (9th Cir. 1964). Assuming this to be so, however, it has only marginal bearing on the question of whether the General Counsel of the Board is a "party" to a criminal proceeding for the purposes of determining whether an immediate appeal can be taken from an order of civil contempt. The Supreme Court, in *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940), while holding that a non-party witness could not appeal a denial of a motion to quash a grand jury subpoena, noted in dictum that appeal would become available if the non-party were to be held in contempt for noncompliance. The Court stated as the rationale for this rule the following:

> At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.

309 U.S. at 328, 60 S.Ct. at 542. *See also Alexander v. United States*, 201 U.S. 117, 121-22, 26 S.Ct. 356, 50 L.Ed. 686 (1905) (dictum); *Fenton v. Walling*, 139 F.2d 608, 610 (9th Cir. 1943), *cert. denied*, 321 U.S. 798, 64 S.Ct. 938, 88 L.Ed. 1086 (1944) (since non-parties have no appeal from a final judgment, they have no right of

review unless they can appeal independently); *accord, David v. Hooker, Ltd.*, 560 F.2d 412, 417 (9th Cir. 1977). *See generally* 9 J. Moore, *Federal Practice* paragraph 110.13[4], at 167 (2d ed. 1975). Therefore, it is significant, as the Board argues, that the General Counsel has no control over a criminal prosecution brought by the Justice Department nor any right of appeal from a final decision.[2] Furthermore, the Board is not subject to direct control by the Executive Branch, but rather is an independent regulatory agency created by statute, *see* 29 U.S.C. § 153(a), and the General Counsel has certain authority independent of the Board. 29 U.S.C. § 153(d). We conclude that the General Counsel is not a "party" to the criminal proceeding here and, therefore, can bring the instant appeal from the civil contempt order below.[3]

2. Effect of this Court's January 9, 1979 Decision

Yet another preliminary issue stands between us and the merits of this case. As noted above, the Board, on January 9, 1979, appealed the district court's denial of its motion to quash and also petitioned for mandamus. This court, *United States v. DiLapi*, 595 F.2d 1205 (2d Cir. 1979), held that denial of a motion to quash is not appealable under 28 U.S.C. § 1291 and that the district court did not clearly exceed its powers so as to warrant mandamus. The court also noted that "Judge Bramwell did not abuse his discretion in finding that

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[2] This case is therefore quite different from our recent decision in *In re Attorney General of the United States*, 596 F.2d 58 (2d Cir. 1979), where we held that the Attorney General, who was named in his official capacity as a party defendant, was a "party" to the action and therefore barred from appeal. 596 F.2d at 62.

[3] Moreover, since both orders arise from the same conduct and raise the same issue, general policies favoring judicial economy and the avoidance of inconsistent results dictate that the civil order be reviewed at the same time. *See United States v. Martin Linen Supply Co.*, 485 F.2d 1143, 1148-49 (5th Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1412, 39 L.Ed. 2d 470 (1974).

the material sought here may be important to preparation of the defense." IDC now urges that this determination is dispositive here.

We believe that this court's January 9 findings, made in connection with its refusal to grant a government petition for mandamus to block issuance of a subpoena by a district court during a pending criminal proceeding, do not necessarily imply that contempt sanctions subsequently imposed by the district court for noncompliance were proper. Standards for the issuance of mandamus are strict, *see In re Attorney General of the United States*, 596 F.2d 58, 62-63 (2d Cir. 1979); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 181-82 (2d Cir. 1979); *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 283 (2d Cir. 1967), and this is particularly so in connection with efforts by the government to obtain interlocutory review of orders in criminal cases. Traditionally, the writ has been used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943), and to avoid a judicial "usurpation of power." *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). The party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 662, 98 S.Ct. 2552, 2557, 57 L.Ed.2d 504 (1978) (plurality opinion); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953). Although these traditionally narrow limits on issuance of the writ have been recently somewhat expanded in certain cases, *see, e.g., La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957) (authorizing "supervisory" mandamus); *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (mandamus to settle "novel and

important" questions); *see generally* Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 Harv.L.Rev. 595 (1973), special considerations which arise when the underlying proceeding is a criminal prosecution make careful limitations on mandamus particularly appropriate. *See Will v. United States*, 389 U.S. 90, 96-98, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *United States v. Weinstein*, 511 F.2d 622, 626 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975); *Stans v. Gagliardi*, 485 F.2d 1290, 1292 (2d Cir. 1973); *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972).

In *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), a district judge, confronted with a refusal by the prosecution in a criminal case to furnish certain information sought by defendants in a bill of particulars and ordered by the court to be produced, indicated his intention to dismiss the indictment. The court of appeals issued a writ of mandamus directing the district judge to vacate his production order. The Supreme Court reversed. After noting that the judicial caution traditionally associated with mandamus must be heightened in criminal cases due to concerns regarding double jeopardy, speedy trial, and narrow statutory limitations on prosecutorial appeal, *Will v. United States*, 389 U.S. at 96-98, 88 S.Ct. 269, the Court found that since the district court had neither exceeded its power nor engaged in any calculated and repeated disregard of the rules governing federal criminal trials,[4] *id.* at 100, 88 S.Ct. 269, the court of appeals had erred in issuing mandamus. The Court made amply

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[4] This latter finding was accompanied by the observation, 389 U.S. at 100 n. 10, 88 S.Ct. 269 n. 10, that those cases involving the use of mandamus to "police procedural rules" (*i.e.*, those cases expanding the availability of mandamus for "supervisory" purposes) were civil cases and indicated that the rule might not apply in criminal cases. Since the record in *Will* supported no systematic or deliberate non-compliance with procedural rules, the Court left the question open. *See* Note, *supra*, 86 Harv. L. Rev. at 622-28.

clear that the mere fact that a district judge's order may be erroneous does not make issuance of mandamus appropriate. A lower court has "power" to make mistakes.

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable."

Id. at 98 n.6, 88 S.Ct. at 275 n.6 (citations omitted). *See also United States v. DiStefano*, 464 F.2d at 850; *Stans v. Gagliardi*, 485 F.2d at 1292 (both per Friendly, J.).

We conclude that once this court found in its January 9 ruling that the district court had not exceeded its power, there was, absent some showing of "a calculated and repeated disregard of governing rules," *see United States v. DiStefano*, 464 F.2d at 850, nothing left to decide. Since the record here is devoid of such a showing, we find that the language regarding "abuse of discretion," in the context of a decision on a mandamus petition, while entitled to some consideration, was dictum. Accordingly, the question of whether Judge Bramwell properly exercised his discretion in issuing the contempt orders disputed here remains to be decided.

3. The Motion to Quash

Rule 17(c) of the Federal Rules of Criminal Procedure provides that a subpoena duces tecum may be quashed or modified if production of the documentary evidence sought would be "unreasonable or oppressive." The party seeking production has the burden of showing that production would not be "unreasonable or oppressive" by establishing:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due

> diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 699-700, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1974) (footnote omitted), *citing United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952) (Weinfeld, J.). Because this four-tiered test is composed of factual issues that must be resolved by the trial court, the decision to quash or modify a subpoena duces tecum must be left to the trial judge's sound discretion. *United States v. Nixon*, 418 U.S. at 702, 94 S.Ct. 3090; *United States v. Berrios*, 501 F.2d 1207, 1212 (2d Cir. 1974). Accordingly, the trial court's decision is not to be disturbed on appeal unless it can be shown that it acted arbitrarily and abused its discretion or that its finding was without support in the record. *United States v. Nixon*, 418 U.S. 702, 94 S.Ct. 3090; *United States v. Berrios*, 501 F.2d at 1212.

On the record before us, it cannot be said that the district court abused its discretion or acted without support in ordering production of the authorization cards. If the cards are in fact forged or otherwise fraudulent, they may provide the defendants with a basis for asserting an entrapment defense. Additionally, the defendants could certainly utilize the cards in attempting to impeach Eason's credibility. Thus, the district court did not abuse its discretion in finding "that the documents subpoenaed bear on the transaction underlying the instant indictment and are material to adequate preparation of IDC's defense ...." We conclude that the requirements of Rule 17(c) were satisfied.

The United States and the Board, however, assert a claim of privilege and contend that the district court did not properly take into account the privileged nature of the authorization cards. The United States and the Board are correct to the extent that authorization cards are indeed privileged material exempt from discovery during Board proceedings[5] and from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.[6] The Board's long-standing policy of

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[5] The National Labor Relations Act provides that employees have the right to form labor organizations and to bargain collectively through representatives of their own choosing free from interference and coercion from either employers or unions. 29 U.S.C. §§157, 158(a), (b). Consequently, the Act requires representation elections to be held by secret ballot. 29 U.S.C. §159(e)(i). To ensure that secrecy is maintained, the Board has traditionally restricted discovery in labor relations proceedings. *See generally Lyman Printing & Finishing Co.*, 183 NLRB 1048, App. A at 1055-56 (1970), and cases therein cited. This policy has generally been upheld by the courts. *E.g., Title Guar. Co. v. NLRB*, 534 F.2d 484, 487 (2d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), *cert. denied*, 402 U.S. 915, 91 S.Ct. 1375, 28 L.Ed.2d 661 (1971); *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir.), *cert. denied*, 368 U.S. 823, 82 S.Ct. 42, 7 L.Ed.2d 28 (1961).

It should also be noted that the rules and regulations of the Board prohibit Board employees from producing "any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in control of the general counsel. . . ." 29 C.F.R. §102.118(a)(1).

[6] *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978) (FOIA does not compel disclosure of union authorization cards); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977) (union authorization cards are exempt from FOIA disclosure). This circuit recently held that even the number of authorization cards submitted during an organizational campaign is exempt from disclosure under the FOIA. *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863 (2d Cir. 1978). *See also NLRB v. Robbins Tire & Rubber Co.*,

(footnote continued on following page)

maintaining the confidentiality of authorization cards and the courts' exempting of the cards from FOIA disclosure are based on the fear of reprisals and the "chilling effect" which would result from disclosure to employers or rival unions.[7]

In this case, the important public interest in maintaining the confidentiality of the cards clashes head on with the defendants' fundamental right to due process of law, for it has been found that the cards are material to the defendants' defense of the criminal charges asserted against them. In similar situations, the Supreme Court has engaged in a balancing process, weighing the conflicting interests involved. *See, e.g., United States v. Nixon*, 418 U.S. at 707-13, 94 S.Ct. 3090

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437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (prehearing witness statements are exempt from FOIA disclosure at least until completion of Board unfair labor practice proceeding); *Title Guar. Co. v. NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976) (prehearing statements of employees and union representatives are exempt from FOIA disclosure to extent such disclosure would interfere with Board enforcement proceedings).

[7] In *Pacific Molasses Co. v. NLRB*, the Fifth Circuit recognized the dangers threatened by the disclosure of authorization cards:

> [I]t is impossible to minimize the seriousness of the threatened invasion. We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the N.L.R.A., and, for all intents and purposes, would make meaningless those provisions of the N.L.R.A. which guarantee secrecy in union elections.

577 F.2d at 1182. *Accord, Committee on Masonic Homes v. NLRB*, 556 F.2d at 220-21. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 239-40, 98 S.Ct. 2311; *Title Guar. Co. v. NLRB*, 534 F.2d at 491.

The threat of violence in the instant case has been substantiated by the affidavit of James D. Harmon, dated January 5, 1979. This sealed affidavit, which was submitted by the United States, was not considered by the district court.

(executive privilege); *Roviaro v. United States*, 353 U.S. 53, 61-62, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (informer privilege).[8] The district court below utilized a balancing analysis and struck a balance in favor of disclosure. We do not believe it erred.

In *United States v. Nixon*, the Supreme Court considered the interests underlying a presidential claim of executive privilege against the interest underlying a prosecutorial attempt to gather evidence in an ongoing criminal prosecution. Although the Court recognized that "great deference" is to be accorded the constitutionally based, fundamental privilege of presidential communications, it nevertheless concluded that the executive privilege may be outweighed by the "legitimate needs of the judicial process." 418 U.S. at 706-07, 94 S.Ct. at 3107. Where the privilege was asserted solely on the basis of a "generalized interest in confidentiality," the Court held that it could not prevail over a "demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713, 94 S.Ct. at 3110.

The factors in favor of disclosure in the instant case are at least as strong as those in *United States v. Nixon*. The Supreme Court's observations in that case apply with equal force here:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if

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[8] In *Roviaro v. United States*, the Supreme Court held that the scope of the informer privilege was to be limited by its underlying purpose. 353 U.S. at 60, 77 S.Ct. 623. In the instant case, the scope of the privilege of the authorization cards must be similarly limited to ensuring that employees who sign authorization cards are free from reprisal and coercion. Hence, as long as the rights and safety of such employees can be adequately protected, the strict confidentiality of the cards must give way to a sufficient showing of need for disclosure.

> judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

418 U.S. at 709, 94 S.Ct. at 3108. Indeed, the considerations supporting disclosure in the case at bar are even stronger than those in *Nixon* in that the rights of defendants are at stake rather than the interests of the prosecution. *See generally Will v. United States*, 389 U.S. at 96-98, 88 S.Ct. 269.

We thus conclude that the authorization cards cannot be kept completely confidential. However, in view of the important and valid public interest in maintaining the confidentiality of authorization cards, and under the specific circumstances of this case, we feel that a more limited order of disclosure than that issued by the district court is warranted. Accordingly, the district court's disclosure order is modified[9] as follows: The subpoenaed authorization cards and membership applications are to be disclosed to the attorneys for the defendants, but they are not to be disclosed to the defendants themselves. The records are to be produced in bulk rather than individually to ensure that knowledge of the identities of the employees

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[9] We acknowledge that great deference is to be accorded the district court's decision as to the scope of a subpoena or disclosure order. *United States v. Nixon*, 418 U.S. at 702, 94 S.Ct. 3090. However, since we are of the opinion that the district court did not give due recognition to the importance of maintaining the confidentiality of the authorization cards, we are modifying the district court's order to provide for limited disclosure. *Cf. In re Attorney General of the United States*, 596 F.2d at 65-68.

who signed the cards can be confined to counsel. This compromise will enable the defendants' attorneys to determine whether any of the cards were forged or are relevant to the defense. At the same time, the confidentiality of the employees will be adequately protected. Should specific forgeries be found or should an explicit showing of need be made, then the district court in its discretion may order full disclosure of the specific cards in question. If after examining the cards counsel for defendants wish to interview particular employees, they may do so outside the presence of the defendants and in the presence of the court or a magistrate so that any interviewed employee will be protected from intimidating or coercive questioning. *See generally* Note, *NLRB Discovery After Robbins: More Peril for Private Litigants*, 47 Fordham L.Rev. 393, 413-14 (1978).

4. The Contempt Orders

With respect to the civil contempt order, we find that the district court did not abuse its discretion. As we have already noted, a civil contempt order is remedial and coercive in nature, and is intended to secure compliance with lawful judicial decrees. It is essential that the courts have the power to compel the appearance of witnesses and the production of evidence. *Shillitani v. United States*, 384 U.S. at 368-70, 86 S.Ct. 1531. In order for a civil contempt order to issue, there must be clear and convincing proof of a violation of a court decree. *Hart Schaffner & Marx v. Alexander's Department Stores, Inc.*, 341 F.2d 101, 102 (2d Cir. 1965) (per curiam); *Stringfellow v. Haines*, 309 F.2d 910, 912 (2d Cir. 1962). Our review of the record leads us to conclude that the evidence clearly and convincingly established grounds for a finding of civil contempt.

With respect to the criminal contempt order, different considerations come into play. The purposes of a criminal contempt order are to punish wilful

disregard of the authority of the courts and to deter the occurrence of similar derelictions. *United States v. United Mine Workers*, 330 U.S. 258, 302-03, 67 S.Ct. 677, 91 L.Ed. 884 (1947). As the Supreme Court has noted, "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong ...." *Bloom v. Illinois*, 391 U.S. 194, 201, 88 S.Ct. 1477, 1481, 20 L.Ed.2d 522 (1968). A conviction for criminal contempt frequently results in serious penalties and carries the same stigmas as does an ordinary criminal conviction. *Id.* at 201-02, 207-08, 88 S.Ct. 1477. *See In re Attorney General of the United States*, 596 F.2d at 65; *United States v. Wendy*, 575 F.2d 1025, 1030 (2d Cir. 1978). A judge should resort to criminal contempt only after he determines that holding the contemnor in civil contempt would be inappropriate or fruitless. *Shillitani v. United States*, 384 U.S. at 371 & n.9, 86 S.Ct. 1531 & n.9. Thus, in our opinion the criminal contempt power is best exercised with restraint.

To warrant being held in criminal contempt,

> the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the *intention* on the part of the contemnor *to obstruct, disrupt or interfere with the administration of justice.*

In re Williams, 509 F.2d 949, 960 (2d Cir. 1975) (emphasis added), *citing inter alia Eaton v. City of Tulsa*, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974) (per curiam), and *In re Little*, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972) (per curiam). In the *Williams* case, we reversed the district court's judgment holding the contemnor in criminal contempt on the grounds the evidence failed to establish beyond a reasonable doubt that the requisite intent was present.

In view of the fact that we have modified Judge Bramwell's disclosure order, the criminal contempt order is vacated and the matter is remanded to the district court for reconsideration in light of this opinion.[10] The civil contempt order is affirmed insofar as it relates to the district court's disclosure order as modified herein.

MANSFIELD, Circuit Judge (concurring and dissenting):

I concur in Judge Werker's carefully considered opinion except for its provision that upon remand any interview of employees by attorneys for the defendants must be conducted "in the presence of the court or a magistrate so that any interviewed employee will be protected from intimidating or coercive questioning" (p. 1037, *supra*). In my view this requirement may have just the opposite effect from that intended. In addition, since many employees are involved, it could result in unnecessary waste of judicial resources and inconvenience to employees.

To require employees who may possibly become witnesses to leave work and proceed to court for interrogation by defense counsel in a strange and formal atmosphere before a judicial official unfamiliar to them may well serve to increase, rather than ease, the apprehension of the employees, as well as to heighten the chance that their identities will become known to the defendants themselves. Since the defendants are already faced with criminal charges in the district court as well

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[10] We note that the Board might well not have defied the district court's order had it been modified in the first instance. Moreover, the Board had no feasible alternative to test the propriety of the discovery order but to disobey it and be held in contempt. Finally, Irving's refusal to produce the authorization cards was based on Board instructions and a well-founded, judicially recognized Board policy of confidentiality. The Board did not delay in filing this appeal and all necessary steps were taken to ensure that this matter would proceed expeditiously.

as with unfair labor practice charges before the National Labor Relations Board, the chance that their counsel would attempt to intimidate a witness in a private interview strikes me as minimal, particularly since evidence of intimidation might be admissible against the defendants at trial. *See United States v. Lord*, 565 F.2d 831, 835 n.2 (2d Cir. 1977); *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989, 93 S.Ct. 1501, 36 L.Ed.2d 188 (1973); 2 Wigmore, Evidence § 278 (3d ed. 1940).

We are not here dealing with the possibility of one or two interviews but with the prospect of interviews of some 150 or more employees.[1] The employees, moreover, may prove to be important to the defense not only to determine whether their signatures were forged (which would require very little questioning) but also to find out whether they were coerced into signing the cards by either Matthew Eason, a convicted felon, or by his alleged henchman Fred Lawson, who, according to the appellees, has been convicted of a long series of felonies, including assault, rape, forgery, and possession of a deadly weapon and of narcotics.

The only practical method for determining whether the employees were subjected to coercion or duress would be to permit defense counsel to interview each employee who signed an authorization card (or at least those who are in the bargaining unit and whose cards were not clearly forged). Each of these interviews would take more time than a mere interrogation to determine the authenticity of the signature. Since defense counsel would not know which employees might have been the subject of coercion or duress, they would,

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[1] The exact number of authorization cards submitted by Local 20408 is unknown, but the NLRB requires signatures of at least 30% of the employees to accompany any representation petition, and IDC has some 500 employees. See Brief for U.S. Attorney at 4; Appendix at 85-86.

under the majority's decision, be forced to subpoena a large number of employees to appear in court for questioning, which would lead to a substantial waste of judicial resources and a greater risk of identification by the defendants.

If approached informally at home or at work the average employee would in my view be much more likely to cooperate in answering questions, particularly if he realized that failure to do so would require him to appear pursuant to subpoena before a magistrate, than if he were forced in the first place to come to court and spend a good deal of time waiting around to be questioned. In short, there would be less risk of intimidation, less waste, and less danger of identification or retaliation by the defendants if the witnesses were interviewed privately by defense counsel and brought before the judge or magistrate only if they proved to be recalcitrant.

I further believe that it should be made clear to the district court that in vacating the criminal contempt order and remanding the matter to it for reconsideration we are not holding that it would be an abuse of discretion for the district court, after full consideration of the record in the light of our modification of its order, to exercise its power to hold parties in criminal contempt. Since we have substantially modified the district court's order so as to preclude access to the authorization cards by the defendants personally and the NLRB had no feasible alternative for testing the original discovery order, we must give the district court the opportunity to reconsider its holding and penalty in the light of our modification and appellant's decision to comply or not to comply with the order as modified. See *Nilva v. United States*, 352 U.S. 385, 396, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957); *Yates v. United States*, 356 U.S. 363, 366, 78 S.Ct. 766, 2 L.Ed.2d 837 (1958); *Donovan v. City of*

Dallas, 377 U.S. 408, 414, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964); and *Southern Railway Co. v. Lanham*, 403 F.2d 119, 135 (5th Cir. 1968).

Appendix D
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY DiLAPI, ROBERT RAO, SIDNEY LIEBERMAN, BENJAMIN LADMER, STEPHEN KINGSTON, DAVID BERGNER, AND INTERSTATE DRESS CARRIERS, INC.,

Appellants.

Nos. 866 and 925 to 929, Dockets 80-1013 to 80-1018

Argued Feb. 14, 1980
Decided Feb. 19, 1980

Appeal was taken by defendants from an order of the United States District Court for the Eastern District of New York, Henry Bramwell, J., denying defendants' motion to dismiss on double jeopardy grounds. The Court of Appeals held that retrial on counts charging defendants with obstructing an administrative proceeding of the National Labor Relations Board and with conspiring to commit substantive offense was not barred by double jeopardy in that jury at first trial had not been empaneled and sworn at time it was discharged over defendants' objection when the NLRB general counsel declined to comply with a discovery order and was held in contempt of court.

Affirmed.

Martin London, New York City (Paul, Weiss, Rifkind, Wharton & Garrison, Ronald W. Meister, David Dunn, New York City, of counsel), for appellants.

James D. Harmon, Jr., Asst. Atty.-in-Charge, U.S. Dept. of Justice Organized Crime Strike Force, Eastern District of New York (Edward R. Korman, U.S. Atty., Thomas P. Puccio, Atty.-in-Charge, Brooklyn, N.Y., of counsel), for appellee.

Before OAKES and VAN GRAAFEILAND, Circuit Judges, and TENNEY, District Judge.*

PER CURIAM:

This appeal is from the Eastern District of New York, Henry Bramwell, Judge. The two counts of the indictment charged appellants with obstructing an administrative proceeding of the National Labor Relations Board, under 18 U.S.C. § 1505, and with conspiring to commit that substantive offense, under *id.* § 371. The charges arose in connection with a representation case initiated by the filing of a petition allegedly on behalf of employees of defendant Interstate Dress Carriers, Inc. Appellants sought to obtain from the Government membership authorization cards executed by employees, first by discovery, and then by subpoenas addressed to the NLRB. On January 3, 1979, the date the trial was to commence, the Government moved to quash the subpoenas. A jury was selected on January 4 and 5, but it was not sworn and did not hear any opening statements or the testimony of any witness. On January 8, the district court ordered the Government to produce the authorization cards, and this court dismissed the Government's appeal and its petition for a writ of mandamus. When the NLRB general counsel declined to comply with a discovery order and was held in contempt of court, the jury was discharged over

* United States District Judge for the Southern District of New York, sitting by designation.

appellants' objection. Subsequently the documents were provided to the defendants, in compliance with this court's decision in *In re Irving*, 600 F.2d 1027 (2d Cir. 1979). The present appeal is from an order of the district court denying defendants' motion to dismiss on double jeopardy grounds. We affirm because the law is settled that jeopardy does not attach until the jury is empaneled and sworn, so that appellants have not yet been placed in jeopardy and retrial is not barred by the double jeopardy clause.

The language of the Supreme Court cases is clear that "in the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975); *see United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642 (1977). The key, as stated in *Serfass*, is that jeopardy does not attach until a defendant is "'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Id.* 420 U.S. at 388, 95 S.Ct. at 1062 (quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971)). While no Supreme Court case has directly ruled on the factual setting here, and Mr. Justice Blackmun is of the view that *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), points in favor of appellants' position, *id.* at 38, 98 S.Ct. at 2162 (Blackmun, J., concurring) (citing Schulhofer, *Jeopardy and Mistrials*, 125 U.Pa.L.Rev. 449, 512-14 (1977)), the majority opinion in *Crist* purports only to hold that "jeopardy attaches when the jury is empaneled and sworn." 437 U.S. at 38, 98 S.Ct. at 2162. Given this state of the Supreme Court law, our own *United States v. Wedalowski*, 572 F.2d 69, 74 (2d Cir. 1978), holding that jeopardy attaches "when the jury is sworn, not when it is selected," is controlling. *See also United States v. Gates*, 557 F.2d 1086 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017, 98 S.Ct. 737, 54 L.Ed.2d 763 (1978); *United States v. Whitman*, 480 F.2d 1028, 1029-30 (6th Cir.), *cert. denied*,

414 U.S. 1026, 94 S.Ct. 453, 38 L.Ed.2d 318 (1973); *Alexander v. Fogliani*, 375 F.2d 733, 734 (9th Cir. 1967).

To be sure, there are cases characterizing the jury oath as a "formality." *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979), and permitting the jury to be sworn after the prosecution has completed its case, *United States v. Hopkins*, 458 F.2d 1353 (5th Cir. 1972), or after opening statements, *Cooper v. Campbell*, 597 F.2d 628, 629 (8th Cir.), *cert. denied*, ____ U.S. ____, 100 S.Ct. 106, 62 L.Ed.2d 69 (1979). Obviously some of the policies behind the double jeopardy clause might well be implicated in a case where the trial has begun but the swearing has not yet occurred. We need not reach that question here, however, since no witness was called and, indeed, no opening statement was made. Nor need we reach the question whether, assuming arguendo that jeopardy attached, further prosecution should be barred.

Judgment affirmed; mandate to issue forthwith.

Appendix E
Decision of United States Court of Appeals In Re DiLapi (2d Cir. Nov. 9, 1979) (Unreported)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of November, one thousand nine hundred and seventy-nine.

Present: HONORABLE WILFRED FEINBERG,
HONORABLE WALTER R. MANSFIELD,
Circuit Judges.
HONORABLE JACOB MISHLER,
Chief Judge,*
District Judge.

In re

ANTHONY DiLAPI, SIDNEY LIEBERMAN, BENJAMIN LADMER, STEPHEN KINGSTON, DAVID BERGNER, SIDNEY GERSTEIN, LOCAL 102, Cloak and Dress Drivers and Helpers Union, International Ladies Garment Workers Union, INTERSTATE DRESS CARRIERS, INC.,
Petitioners.

Docket No. 79-3079

The petition of the defendants for a writ of mandamus in the case of *United States v. Anthony DiLapi, et al.*, 78 CR 496, pending in the District Court for the Eastern District of New York, to which the Government has responded by letter dated November 5, 1979, is granted to the limited extent that United States District Judge Henry Bramwell is hereby directed to permit representatives of Paul, Weiss, Rifkind & Garrison, attorneys for the Petitioners, to seek to interview employees and former employees of Interstate Dress

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*Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix E
Decision of United States Court of Appeals In re DiLapi (2d Cir. Nov. 9, 1979) (Unreported)

Carriers, Inc., who are claimed to have signed cards authorizing Local 20408 to represent them, outside of the presence of the court and at any location where the said employees may be found on the following conditions:

(1) The representatives seeking to interview the employees will state to the court that they will not engage in any intimidation or coercion of the employees interviewed;

(2) The interviewing representatives doing the interviewing will not reveal the identity of the interviewees or the substance of what they have stated to the defendants;

(3) The interviewing representatives will, to the extent deemed practical by the district court, make a stenographic record of each interview.

The district court will adjourn the trial of the case for such period as it deems reasonable to permit the interviews to be conducted.

/s/ _____
Wilfred Feinberg, U.S.C.J.

/s/ _____
Walter R. Mansfield, U.S.C.J.

/s/ _____
Jacob Mishler, U.S.D.J.

Appendix F
Statutory Provisions Involved in the Case

STATUTORY PROVISIONS

18 U.S.C. § 3161. Time limits and exclusions.

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed

or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

Appendix F
Statutory Provisions
Involved in the Case

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from

the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number

of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of inter-jurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

18 U.S.C. § 3162. Sanctions

(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion

but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

18 U.S.C. § 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

18 U.S.C. § 3164. Interim limits

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first

day of the interim period shall commence no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his non-financial conditions of release under this title to insure that he shall appear at trial as required.